15-579 464 5

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~327.~~ 81

FRENCH, HANNA AND COMPANY, APPELLANTS,

vs.

JONATHAN K. GAPEN ET AL.

**FILED NOVEMBER 5, 1878.**

No. ~~337.~~ 91

JAMES S. SPEARS ET AL., APPELLANTS,

vs.

JONATHAN K. GAPEN, THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL, ET AL.

**FILED NOVEMBER 18, 1878.**

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

# SUPREME COURT OF THE UNITED STATES.

## No. 327.

FRENCH, HANNA AND COMPANY, APPELLANTS,

vs.

JONATHAN K. GAPEN ET AL.

**FILED NOVEMBER 5, 1878.**

## No. 337.

JAMES S. SPEARS ET AL., APPELLANTS,

vs.

JONATHAN K. GAPEN, THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL, ET AL.

**FILED NOVEMBER 18, 1878.**

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.


| | Original. | Print. |
|---|---|---|
| Bill of complaint | 2 | 1 |
| Demurrer of trustees to bill | 29 | 9 |
| Ruling on demurrer | 31 | 10 |
| Answer | 32 | 11 |
| Replication | 63 | 19 |
| Decree (July 17, 1875) | 64 | 20 |
| Special master's report | 68 | 21 |
| Decree (March 23, 1876) | 75 | 23 |
| Report of sale | 79 | 24 |
| Special master's report (June 6, 1876) | 85 | 26 |
| Appointment of receiver | 91 | 28 |
| Cross-bill of Spears and Case | 93 | 29 |
| Exhibit A to cross-bill S. and C., (lease) | 108 | 34 |
| Subpœna to cross-bill | 133 | 46 |
| Demurrer of receiver to cross-bill | 135 | 47 |
| E. H. Shirk et al. to cross-bill | 137 | 48 |
| board of trustees to cross-bill | 139 | 48 |

| | Original. | Print. |
|---|---|---|
| Ruling on demurrers, appeal, &c., final entry | 141 | 49 |
| Petition of Morgan French et al | 144 | 50 |
| Amended petition, French et al | 145 | 50 |
| Exhibit to petition, French et al., lease | 159 | 54 |
| Demurrer of receiver to petition | 165 | 56 |
| Fleming et al. to petition | 166 | 57 |
| Jonathan K. Gapen to petition | 168 | 57 |
| Ruling on demurrers to petition | 171 | 58 |
| Decree | 171 | 58 |
| Appeal of Spears et al | 172 | 58 |
| Appeal of French, Hanna & Company | 173 | 59 |
| Clerk's certificate | 174 | 59 |
| Assignment of errors by Spears et al | 175 | 59 |
| Assignment of errors by French, Hanna & Company | 177 | 60 |

1 Pleas of the circuit court of the United States for the district of Indiana begun and holden at the United States court house in the city of Indianapolis, in said district, on the first Tuesday of November in the year of our Lord one thousand eight hundred and seventy-five, before the honorable Thomas Drummond, judge of said circuit court, and the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and ex-officio judge of said circuit court.

| | |
|---|---|
| JONATHAN K. GAPEN<br>*vs.*<br>THE BOARD OF TRUSTEES OF THE WABASH and Erie Canal, | 3719. Original bill. |

AND

| | |
|---|---|
| JAMES S. SPEARS, JOHN S. CASE, JAMES C. Case, Reed Case, Charles G. Case, Josephine C. Schermerhorn, Barnard F. Schermerhorn and Hulda E. Case<br>*vs.*<br>JONATHAN K. GAPEN, THE BOARD OF TRUSTees of the Wabash & Erie Canal, Samuel B. Gookins, Elbert K. Shirk, H. J. Shirk, A. N. Dukes, Thomas J. Swimel, William Dollan, Jacob W. Dritt and Charles B. Knowlton, | Intervening bill. |

2 AND

| | |
|---|---|
| R. MORGAN FRENCH, OLIVER W. JEFFERDS, Charles Harmat, Warren H. Withers<br>*vs.*<br>JONATHAN K. GAPEN, THE BOARD OF TRUSTees of the Wabash and Erie Canal, Samuel B. Gookins, Elbert K. Shirk, H. J. Shirk, A. N. Dukes, Thomas J. Swimel, William Dolans, Jacob W. Dritt and Charles B. Knowlton | Intervening bill. |

Be it remembered that heretofore, to wit, at the November term of said court, on the 19th day of November, A. D. 1874, the following proceedings in the above entitled cause were had, to wit:

Comes now the complainant by Mess. Claypool and Ketcham, his solicitors, and files his bill of complaint herein, in the words following, to wit:

*Bill.*

And at the same time comes the defendant, by Mess. McDonald and Butler, its solicitors, and files its written appearance herein in the words following, to wit:

To the honorable the judges of the circuit court of the United States for the district of Indiana.

3 Jonathan K. Gapen, resident in the city of New York, and a citizen of the State of New York, on behalf of himself and all

persons & corporations who are the holders of any of the canal stock issued by the State of Indiana, hereinafter specifically mentioned, brings this his bill against the board of trustees of the Wabash & Erie Canal, a corporation created by and existing under the laws of the State of Indiana, and having her office and place of business in the city of Terre Haute and State of Indiana, and humbly complaining your orator shows that at and prior to January, 1846, the State of Indiana had outstanding and unpaid a large public debt amounting to many millions of dollars, upon which debt the State was then unable to pay and had made default to pay the interest for five years, and the State was at that time the owner of a long line of canal then in course of construction and past completed, and also the owner of many thousand acres of land which had been granted to the State by the United States to aid the State in constructing the canal hereinafter more particularly mentioned: and the State was unable to complete said canal, and for the purpose of providing for the payment of the State debt and for the
4 completion of said canal the general assembly of the State of Indiana passed an act approved January 19th, 1846, entitled "Act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville," and also passed another act supplementary to said act approved January 27th, 1847. By these two acts taken together it was provided that such of the holders of the bonds of the State as might chose to do so, might surrender the bond or bonds held by them, and receive in exchange therefor two new certificates of stock, as they were called, each for one-half of the bond or bonds surrendered, and also receive two other certificates called special stock, each for one half of the arrears of interest between 1st of January, 1841, and Jan'y 1st, 1847, and one of the new certificates of stock so issued for one half of the principal of the bond or bonds surrendered and one of the certificates of special stock for one-half of the arrears of interest as aforesaid should be paid by the State and the other two certificates, one for one-half of the principal and one for one-half of the arrears of interest should be chargeable upon and paid out of the
5 proceeds of said canal—its lands, tolls, and aevenues. And by said act it was also provided that the bondholders for the purpose of better securing the payment of that chargeable on the canal might raise among themselves, by pro rata subscription upon the amount of bonds subscribed by each, the sum of eight hundred thousand dollars to complete the Wabash and Erie Canal to Evansville, and that the canal lands and all the tolls and revenues of said canal should be specifically set apart and conveyed to said trustees in trust and security to reimburse to the said subscribers to said $800,000 their subscriptions and advances to complete the canal and to pay that part of the above mentioned stocks which were made chargeable upon the canal.

Your orator further shows that the defendant was for the purpose of receiving said conveyance and for other purposes in the aforesaid acts mentioned and provided for duly constituted under and in accordance with the provisions of said acts a body corporate and in accordance with the authority given by the said acts the proper officers of the State of Indiana did issue divers classes of Wabash & Erie Canal
6 stocks representing in part one-half of the principal and interest of the bonds surrendered by bondholders as aforesaid, and in part the money subscribed and advanced on account of said $800,000.00 to complete the canal to Evansville, which stocks as is required by the aforesaid act of 1847 recite on their face that the canal, its tolls, etc., are pledged to pay them.

Your orator further shows that on the 30th day of July, 1847, the State, being as aforesaid the sole owner of said canal, and of its lands and appurtenances of every kind, did in accordance with the provisions of said acts, by the governor of the State, make and execute, and deliver to said trustees, by the corporate name of the board of trustees of the Wabash and Erie Canal, a deed for the bed of the Wabash & Erie Canal, and its extensions finished and to be finished from the Ohio State line, to Evansville, Indiana, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, locks, dams, water-powers, and structures, and all materials, provided or collected for its construction, and all the property, right, title, and interest of the State in and to the same, with all its appurtenances, and also all lands and lots (not
7 then sold or disposed of), which had at that time been given, granted, or donated by the United States to aid in the construction of said canal, or any part thereof, or which might hereafter be assigned under or by reason of any grant then existing, and all moneys then due and becoming due, and remaining unpaid on account of any sales before that time made of any canal lands donated, and all moneys due or becoming due on account of any existing lease of any water-power or other privileges on said canal, its side-cuts, feeders, basins, or other appurtenances, to have & hold the same in trust and security for the uses and purposes following; that is to say:

First. In payment of the work and labor and materials, or contracts for the supplying of work, labor, or materials, then to be done in and about the further prosecution & construction of said canal and works until the same might be completed to Evansville.

Secondly. In payment of interest after the rate of six per cent. per annum, on sums advanced to the trustees to complete the canal.

Thirdly. In payment in full of the principal sums advanced to complete the canal.

8 Fourth. In payment in full to subscribers making the said advances, or to their assignees, of interest at five per cent. on the moiety of the principal of the bonds which they might surrender and exchange for certificates, interest computed from January 1st, 1847.

Fifthly. In payment in full to the subscribers making such advances, or their assigns, the principal of the special stock issued to them for arrears of interest as aforesaid, with interest computed from January 1st, 1853.

Sixthly. In payment in full to the subscribers making said advances, or to their assignees, of the principal moneys secured by each certificate charged as aforesaid over against the canal lands & tolls and revenues.

Seventhly. In payment in full to other holders of certificates of stocks by said act of 1847, directed to be issued and charged against said canal as aforesaid (such holders not being subscribers to the said advance), or their assignees, of interest at five per cent. per annum.

Eighth. In payment in full of the interest on special stocks issued for arrears of interest as aforesaid to holders, or their assignees, who were not subscribers to said advance fund, at five per cent., computed from 1st Jan., 1853.

9 Ninth. In payment in full of the last-named stocks.

Tenth. To pay into the treasury of the State any surplus after making the several payments in the nine preceeding classes mentioned. The order of priority above expressed is subject, nevertheless, to the qualifications following, that is to say, these were several issues of bonds under separate acts of the general assembly of the State of Indiana of 1832, 1834, & 1836, to secure payment of loans to complete the

eastern division of said canal from Lafayette eastward to the Ohio State line. And the bonds issued under each of said acts were made liens upon that part of the canal, and the canal, its tolls, &c., were specifically pledged to pay said bonds, and these bonds at and prior to 1846 were a prior lien upon said part of the canal, and by said acts of 1846 & 1847 the right and priorities of the holders of said bonds were expressly reserved, and the eastern division of said canal is first pledged to pay all stocks, including special stocks issued in exchange for said bonds, which are commonly known as canal bonds.

Your orator further shows that on the day said deed was made
10 as aforesaid the said corporation accepted the same and went into the possession and dominion of the property by the said deed so conveyed, and thereby become vested with an equitable estate in the property so conveyed, not for the private gain of said corporation, but solely for the purposes of providing payment for the aforesaid scrip obligations, and for the purpose of completing said canal, and for the other purposes above mentioned and contained in the aforesaid two acts of the general assembly of the State of Indiana, and the said corporation, by accepting said deed, become charged with each and every one of the trusts imposed by the said deed and said acts. When the said defendant accepted the legal title to said property in trust for the benefit of the holders of canal stock, these had been finished 189 miles of the canal, being the portion between the Ohio State line and Coal Creek, and these remained to be finished by the said defendant with the means provided by the said act 186 miles of said line of canal, being the portion between Coal Creek and Evansville, and it was in and by said act made the duty of the defendant to adopt and put into exe-
cution such plans and measures as should be deemed most expe-
11 dient for the speedy completion of the canal to Evansville within the period required by the act and the terms of the grant from the United States.

And your orator shows that the estimated cost of completing the said canal at the said was about $2,000,000, and the means provided for such completion was the subscription or advance recited in the said acts, and as above stated, and the avails of about 793,485 acres of lands in the Vincennes district, donated by the United States to be specifically applied to such completion. About the year 1854, the said defendant had fully completed the said Wabash and Erie Canal to Evansville, and the said work was prosecuted upon land which was conveyed to said defendant, or was by it condemned under the eminent domain powers granted in the act of Jan. 27th, 1836, entitled "An act to provide for a general system of internal improvements," and subsequently vested in the said defendant, and by virtue of which powers, and the said patent from the State, the defendant has held since 1853, and now holds, the fee simple title to the entire canal bed for 375 miles, with its tow-paths,
feeders, basins, appurtenances, and land grants, in trust as afore-
12 said. In consequence of inadequate water supply and the destruction several times repeated of the reservoirs or water basins, on the portion of the canal south of Terre Haute, navigation was but feebly maintained on that part of the canal for about two years, and about the year 1860, in consequence of such disabilities, and the railway competition drawing off the traffic, the defendant, from want of means, was forced to and did abandon all further commerce and business on that portion of the canal south of Terre Haute, and for about ten years last past the water has been drawn from the bed on that portion, and the same has not been and cannot be used as a public highway, as con-

templated in the said acts, and by the act of Congress aforesaid. The annual 5% interest which it was contemplated by the said acts to liquidate out of the net receipts of said canal amount to about the sum of $350,000, while the highest gross revenue derived from the business of the canal was in the year 1852, when it reached $193,400, and in the year 1859 the said defendant, in the official report made by direc-
13 tion of law to the general assembly, stated its inability to maintain navigation on any portion of the canal, and that it had made certain repairs and maintainance contracts with divers citizens of the State of Indiana, whereby such citizens agreed to advance their own moneys to the repair and protection of such work, and look to be reimbursed out of the tolls and revenues.

And your orator shows to the court that the present condition of the trust property as to that portion of the canal south of Coal Creek is now and has been for about 10 years practically abandoned, and for want of water supply and breaches and waste, and has been and is daily wasting and going to destruction; that the portion of the canal in which navigation is maintained has been mainly kept up by the private advances made by the counties and towns through which it passes; that it is in bad repair and a large amount of expenditures should be made at once to render it convenient and reasonably fit for navigation. The revenues of the canal from navigation have dwindled to a sum which is utterly inadequate to even pay repair and superintending ex-
14 penses. For the entire year of 1871, the gross collections from tolls and water-rents being only about $50,000, and for each year since the receipts have been greatly less than that sum, and are gradually becoming less each year. The defendant is without means or assets to repair the work or secure any large amount of business in any manner, and the communities which for some time assisted by donations to keep the eastern 186 miles of the canal open for business have withdrawn all further money and donations, and decline to give any aid in keeping the canal in navigable order, and the defendant will, therefore, be wholly unable to keep up navigation on any portion of said canal, and it will fall into disuse and ruin.

Your orator shows that in and by the report made by the defendant to the general assembly of 1872, that it appears that the said trust is insolvent, and that the work of completing the extension of said canal, and in its yearly expenditures for repairs, renewal, and superintendence, that the entire amount of the grant of lands donated by the United States has been absorbed, and that of the original amount in value of such
15 land grant there is now only left unsold lands to the nominal appraised value of about $50,000, which are, as your orator charges, the refuse of said grant, mainly unsaleable, of little commercial worth, and of no value whatever to assist in extricating the said defendant from its present embarrassment or in putting the line of said work in order so as to answer its purpose as a public highway, because, by the restrictions and limitations imposed on the said defendant by the said acts of 1846 and 1847, and also by virtue of the restraint of a certain writ of injunction issued out of the circuit court of the United States for the district of Indiana, in the year 1860, at the suit of one John Ferguson, the said board of trustees of the Wabash and Erie Canal were prohibited from applying any of the proceeds of lands sold or its assets other than tolls to the repair of the canal, and the said defendant, even if possessed of large means, is prohibited by the terms of said acts from investing any portion of its funds in the purchase of

boats or equipment for use on said canal, and the development of
16 business, and consequent increase of tolls and revenue.

And your orator shows that he is the owner and holder of stocks of the different classes designated by the said acts to the aggregate amount as to the principal thereof, $575,606. A copy of one of said certificates of stock is filed herewith, and your orator is ready and willing to produce on the hearing or otherwise as the court may direct all such stock certificates. No interest whatever has ever been paid on any of the stock certificates issued under said acts except those issued to subscribers to the $800,000 advance made for the completion of the canal to Evansville; on this account certain payments have been from time to time made, but a large amount is still due even on said advance sums for the residue of the principal and accrued interest installments, and the whole amount now nominally due for principal and interest on the canal stocks of your orator and other scrip holders amounts to over sixteen million dollars, and they have no security or pledge therefor except the said line of canal which is rapidly deterioration in value
17 and becoming worthless to them and to the public. The holders of said canal stocks are very numerous and are scattered all over the world, and the most of them reside in England, Holland, Germany, and other foreign countries, and their names are mainly unknown, and in consequence of the fact that the said holders are very numerous, scattered, unknown and foreign residents, the requirement of said acts that election of trustees shall be by a majority in numbers and value of such holders has become impossible of execution, and so it is that there has not been for about nine years last past any election for trustees as required by the said act, and the present elective members of said board hold over in their office because of the failure and impracticability to hold any new election.

And your orator shows that it was the original design and intent and the sole object of said original and supplemental act to secure and perpetuate an adequate public highway through said State of Indiana, from Evansville to the Ohio State line, and also by the pledge of what was then estimated a most valuable and rapidly increasing rev-
18 enue to provide an adequate security for the payment of one-half of the public debt of the State outstanding in 1846 with the accrued interest on such moiety together with stated interest thereafter. And at the creation of said trust, it was the judgment of all therein concerned that the tolls and revenues of the said canal when completed would be more than sufficient to liquidate from time to time as they matured the installments of interest and yield such a surplus as to establish a sinking fund for the benefit of the State to enable her to extinguish and take up the principal sum represented by said canal stocks, and the State, in and by the said acts, the State reserved an equity of redemption in the said canal, and the right to annul and determine said trust by a payment of the principal of the certificates at any time after twenty years from the passage of the act of January 27, 1847; but your orator shows that because said canal, by railway competition, casualties, and diminished business, has been practically destroyed as a rev-
19 enue producer that the State has not exercised her option which was reserved in the said acts, but in the year 1857 by her general assembly declared that it was not the purpose of the State to exercise such right of redemption, and in the year 1873 the said State adopted an amendment to the constitution thereof by which the general assembly is expressly prohibited in any manner or at any period from assum-

ing or liquidating any portion of such canal stocks or taking control of the said canal as a public work of the State.

And your orator shows that it was intended by the said acts that the general assembly of the State should, at all times, keep an adequate and satisfactory control over the said trust property and its management, and to that end it was provided that the State should always appoint one member of such board of trustees, and should, by certain reports and examinations of designated committees and officers, exercise a supervision over the revenues of said public work in which the State had such residuary interest as aforesaid, but so it is, that in truth and in fact, although reports have been made from time to time by de-
20 fendant to the general assembly, that the committee of ways and means have not, for the past 18 or 20 years, made any examination or report thereof, nor has the State auditor during the period last aforesaid made any such statement or exhibit of the condition and workings of said trust fund as by law required, or kept any account thereof upon the public books of account of State showing its condition as by law required, nor has the said State auditor for the last 18 years made any report to the general assembly of the condition of the canal fund and canal bonds, nor has the said defendant, from want of means, been able for the past two years to report their transactions to the subscribers half yearly as ordered by the said acts.

And your orator shows that in and by the said acts it is provided that said stock shall be assignable in New York only in books provided by the State, that by recent legislation abolishing the State agency in New York and making no appropriation or provision for such transfer office or books or agent, that there is no means now left to the
21 holders to transfer said stock, and that by reason of such matters that all the provisions of the acts touching the transfer and reissue of such stocks has become impossible to execute, and the assignable character of such stocks has been utterly destroyed. And it is further required in execution of the compact between the State and the United States in that behalf, that when completed to Evansville the said canal should be thereafter perpetually maintained to the use of the inhabitants of the State and all other persons a public highway free to the use of all commerce on the payment of reasonable tolls, and it was also recited in the said acts that the said defendant should at all times keep in repair proper bridge structures at public road crossings over the said canal.

And your orator shows that in consequence of the want of revenue and its insolvency aforesaid the said defendant is now, and for the past 13 years has been, disabled and prevented from maintaining such
22 public highway and such road crossings to the great damage of your orator and all other holders of such canal stock, and also of the people of the State, and great risk is hazarded if such state of affairs continue that such forfeitures and liability will occur; that the entire pledged property will be swept away from the use of your orator and other creditors similarly situated.

Your orator shows that in and by the said acts the said defendant was given very limited corporate powers, and was hampered by divers conditions & restrictions which, in the present situation of the property, serves to destroy its revenue and render the attainment of the sole object of the trust wholly impossible; that the said defendant cannot mortgage said canal and with the proceeds of the loan put it in navigable order; nor has it any power to execute notes and borrow money in any other manner for the uses of said property, nor can it use the pro-

ceed of land sales for that purpose, nor can it in any manner be
23 interested in maintaining vessels on said canal, but has only legal power to act as a mere toll-collector on the commerce of others passing through the said work.

And your orator shows that for the reasons aforesaid the State of Indiana has abandoned and determined all her contingent interest in the said canal and canal fund so pledged in trust as aforesaid, and that in consequence of the insolvency of the defendant, and the present abandoned and deteriorating condition of said canal and appurtenances, that the defendant is wholly unable to carry out and effectuate the true design and intent of said act, or to preserve in unimpaired condition the trust fund for the benefit of those entitled, and the further execution of the trust designed by the said acts has become, so long as the property remains in the custody of the defendant, wholly impossible.

And your orator shows that the actual value of said trust fund is, probably, at least $1,500,000, and that if such canal was owned and managed unrestricted by the disabilities of such insolvent special
24 trustee, as is the defendant, that it could be improved, repaired, and made capable of producing revenue, and then pay a small portion of the debt charged against and of taxable value to the State, and largely answer to commercial necessities of the region of country traversed by it, but if suffered to remain longer in its present management and condition that the whole property will and must of necessity become worthless to the pledges thereof, who will lose their entire demands, and the canal will no longer be maintainable as a navigable highway, but will, when so abandoned, become and continue a public nuisance and source of disease to the citizens of the State.

Wherefore, your orator, in behalf of himself and other holders of canal stock aforesaid, prays that inasmuch as he is without adequate remedy at law, and can only have full and complete relief in a court of equity where matters of the kind embraced and charged in this bill are properly cognizable and relievable, that a writ of subpœna in chan-
25 cery be issued against the defendant, the board of trustees of the Wabash and Erie Canal, and that said defendant be required to answer all and each of the allegations and charges in this bill contained and made as fully as if the same were repeated in the form of interrogatories, and that the defendant answer and show fully and completely the condition of said trust property, and particularly as to the matters of which an accounting is hereinafter asked.

And your orator prays that an account may be taken of the amount and classes and priorities of said stock issued under the aforesaid acts, either original or by way of reissue; also of the amount now justly due for principal and interest upon all such classes of stock, and the names of the different holders and the amount severally due to each; also an account of the transactions of the said trust from its origin until the present time, showing the different receipts and disbursements on account thereof, and on what accounts made and to whom, and what the
26 present condition of said canal fund is, and of what the assets of the canal now consist, and in whose hands they now are, and all other matter necessary to truly and fully show and exhibit to this court for the benefit of your orator and others for whom this bill is filed, the exact condition of the said trust.

And your orator further prays that the defendant answer and show what lands have been purchased for the use of said canal, and what lands purchased by the trustees for the use of the canal, if any, have been sold, and where situated, and to whom sold and for what price;

and also answer and show what lands, if any, heretofore used by the canal for the purpose of reservoirs and in about the reservoirs have been sold during the last five years, and to whom sold, and for what price.

And your orator further prays that the said court shall take into its hands, and administer by the hands of one or more sequestrators to be appointed, the wasting trust estate now in the hands of the insolvent corporation the defendant, to the end that it may, under such
27 directed orders as the court may make in accordance with equity practice, be so administered as to preserve and protect it, and apply its revenues and rents until such time as a final decree may be enrolled herein. And when said accounts are taken as herein prayed, your orator further prays that the pledge and appropriation recited in said stocks shall be effectuated and the said canal and its appurtenances and lands may be decreed to be sold in such manner and on such terms as the court may deem best for the interests of those entitled to share in the proceeds thereof, and so as to bring the highest price therefor and so as to vest title in the purchaser or purchasers thereof with the right and duty to impose, maintain, and operate the same and receive and enjoy the future tolls & revenues thereof as fully in all respects as the State might originally have done, and on such sale being made and the proceeds brought into court, your orator prays that
28 the said fund may be divided among himself and all other holders of said canal stocks according as their several ownerships, amounts, and priorities may be from time to time established to the satisfaction of the court and so decreed.

And your orator prays that any and all persons or corporations owning any of said canal stock may be permitted to become a party plaintiff on petition and on the usual terms as to contribution to the expense of instituting and carrying forward the proceedings for common benefit of all holders of said securities.

And your orator prays that the court will from time to time grant all such further and other relief which is not herein specially prayed for, but which may be found necessary to protect and secure the just equities and priorities of your orator and other holders of such stocks, and as the court may be competent to award in the premises.

CLAYPOOL, MITCHELL & KETCHAM,
*Atty's for Complainant.*

We acknowledge ourselves surety for the payment of cost herein.
SOLOMON CLAYPOOL.
W. F. KETCHAM.

29 And afterwards, to wit, at the November term of said court, on the 23d day of December, 1874, before the Hon. Thomas Drummond, on' of the judges of said court, the following further proceedings in the above entitled cause were had, to wit :

*Demurrer.*

Comes now the defendant, by Mess. McDonald and Butler, its attorneys, and files its demurrer to the bill herein, in the words following, to wit :

And the court having heard the argument thereon, doth now take the same under advisement.

The demurrer of the trustees of the Wabash and Erie Canal, the defendant in the above bill.

This defendant by protestation not confessing nor acknowledging all or

any of the things in the said complaint contained to be true in such manner and form as the same are therein and thereby set forth and obliged, doth demur in law to the said bill, and for cause of demurrer showeth, that the said complain't hath not by his said bill made such a case as entitles him in a court of equity to any discovery or relief from or against this defendant touching the matters contained in said
30 bill or any of such matters.

And for further cause of demurrer shows that it appears by said bill of complaint that the State of Indiana named therein has a substantial interest in the matter embraced in said bill and to be effected by the relief therein sought, and is a necessary and indespensible party to said bill and to the full and complete determination of said cause, and yet the said State of Indiana is not a party to said bill.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to said bill and to all matters therein contained, and prays judgment of this honorable court &c., and also prays to be hence dismissed with her reasonable costs in the behalf sustained.

McDONALD AND BUTLER,
*Att'ys for Def'ts.*

We certify that in our opinion the above demurrer to the plaintiff's bill of complaint is well founded in point of law.

McDONALD AND BUTLER,
*Att'ys for Def'ts.*

31 UNITED STATES OF AMERICA,
*District of Indiana:*

Before the clerk of the United States circuit court for the district of Indiana, in this day came Charles Butler, one of the trustees of the Wabash and Erie Canal, the defendant in the above suit, who, being duly sworn, says on behalf of the defendant, that the above demurrer is not interposed for delay, and further says not.

CHARLES BUTLER.

Subscribed and sworn this 23d Dec'r, 1874, before me.

J. D. HOWLAND,
*Clerk.*

And afterwards, to wit, at the November term of said court, on the 2d day of February, 1875, before the Hon. James C. Hopkins, acting judge of said court, the following further proceedings in the above entitled cause were had, to wit:

The court being now sufficiently advised upon the demurrer to the bill heretofore filed in this case, and argued by the counsel of the respective parties, overrules the same, with leave to the defendant to
32 answer the bill by the first Monday of April next.

And afterwards, to wit, in recess of said court on the 5th day of April, 1875, the following further proceedinds in the above entitled cause were had, to wit:

Comes now the defendant, by Mess. McDonald and Butler, its solicitors, and files its answer herein in the words following, to wit:

*Answer.*

The answer of the trustees of the Wabash and Erie Canal to the bill of complaint exhibited herein against them by the complainant, Jonathan K. Gapen:

These defendants, reserving all manner of exceptions to the said bill of complaint on account of the many and manifold errors and insufficiencies therein contained, for answer thereto, or to so much thereof as they are advised it is material for them to answer, answering, say:

I. They admit that the said Jonathan K. Gapen, complainant as aforesaid, is a resident of the city of New York, and a citizen of the
33 State of New York; and they admit that the board of trustees of the Wabash and Erie Canal is a corporation created by and existing under the laws of the State of Indiana, and that the principal office and place of business of the said trustees is in the city of Terre Haute, in the State of Indiana.

II. And, further answering, they admit that the said State of Indiana, prior to the year 1846, and at that time, was largely indebted, and that said indebtedness amounted to many millions of dollars; that said State was in default in the payment of interest five years previous to the said last named date, and was at that time unable to pay her said indebtedness. They further admit that she was the *the* owner of a long line of canal then in course of construction, and partly completed, and was also the owner of many thousand acres of land which had been granted to the State by the United States to aid the said State in constructing the canal referred to in said bill of complaint, and that said State was at that time unable to complete said canal.

III. And these defendants further admit that, for the purpose
34 of providing for the payment of said State debt, and for the completion of the said canal, the general assembly of the State of Indiana passed an act approved January 19th, 1846, entitled "An act to provide for funding the debt of the said State and for the completion of the Wabash and Erie Canal to Evansville," and also passed another supplementary act thereto, approved January 27th, 1847.

IV. And these defendants, further answering, admit that these two acts, taken together, provided that such of the holders of the bonds of the said State as might choose to do so might surrender the bond or bonds held by them and receive in exchange therefor two new certificates of stock, as they were called, each for one-half of the bond or bonds surrendered, and also receive two other certificates, called "special stock," each for one-half of the arrears of interest between the first of January, 1841, and the first of January, 1847, one of the new certificates of stock so issued for one-half of the principal of the bond or bonds surrendered, and one of the certificates of special stock for one-half of the arrears of interest, as aforesaid, should be paid by the State, and the other
35 two certificates, one for one-half of the principal and one for one-half of the arrears of interest, should be charg'able upon and paid out of the proceeds of the said canal, its lands, tolls, and revenues.

V. And these defendants further admit that by the said act it was also provided that the bondholders, for the purpose of better securing the payment of that chargeable upon the canal, might raise among themselves by pro rata subscriptions upon the amount of bonds subscribed by each the sum of eight hundred thousand dollars, to complete the Wabash and Erie Canal to Evansville; and that the canal lands and all tolls and revenues of said canal should be specifically set apart and

conveyed to the said trustees in trust and security to reimburse the said subscribers to the said eight hundred thousand dollars, the amount to be by them advanced to complete the canal, and to pay that part of the above mentioned stock which was made chargeable upon the canal.

VI. And these defendants further admit that for the purpose of receiving such conveyances, and for other purposes in the aforesaid acts mentioned and provided, they were duly constituted under and in accordance with the authority given by said acts or corporation and the proper officers of the State Indiana did issue divers classes of Wabash and Erie Canal stocks, representing in part one-half of the principal and interest of the bonds surrendered by the bondholders aforesaid, and in part the money subscribed and advanced on account of said eight hundred thousand dollars to complete the canal to Evansville, which stocks, as is required by the acts aforesaid, recite on their face that the canal, its tolls, &c., are pledged to pay them.

VII. And these defendants further admit that on the thirtieth day of July, 1847, the State then being the owner of the said canal and of the lands and appurtenances, did, in accordance with the provisions of the said acts, by the governor of the State, make, execute, and deliver to these defendants, trustees as aforesaid, by the corporate name of "The Board of Trustees of the Wabash and Erie Canal," a deed for the bed of the Wabash and Erie Canal and its extensions, finished and to be finished, from the Ohio State line to Evansville, Indiana, including its banks, margins, tow-paths, side-cuts, feeders, basins, rights of way, locks, dams, water-power, structures, and all material provided or collected for its construction, and all the property, right, title, and interest of the State in and to the same, with all its appurtenances, and also all lands and lots, not theretofore sold or disposed of, which had at that time been given, granted, or donated by the United States in aid of the construction of the said canal, or any part thereof, or which might thereafter be assigned to it by reason of any grant then existing, and all moneys due and to become due and remaining unpaid on account of any sales before that time made of any canal lands donated, and all moneys due or to become due on account of existing leases of any water-power or other privileges in said canal, its side-cuts, feeders, basins, or other appurtenances; all of which is more fully set forth in the said deed, to which these defendants refer, for greater certainty; to have and to hold the same in trust as security for the uses and purposes in said deed set forth, and in pursuance of the provisions of the acts of the general assembly of the State of Indiana above referred to.

VIII. And these defendants, further answering, admit that the uses and purposes of the trust created in said deed are set forth in the following order, as alleged or charged in said bill of complaint; that is to say—

First. In payment of the work and labor materials, or contract for the supplying of work, labor, or materials, then to be done in and about the further prosecution and construction of said canal and works, until the same might be completed to Evansville.

Secondly. In payment of interest after the rate of six per cent. per annum on sums advanced to the trustees to complete the canal.

Thirdly. In payment in full of the principal sums advanced to complete the canal.

Fourthly. In payment in full to subscribers making the said advances, or to their assignees, of interest, at five per cent. on the moiety of the

principal of the bonds, which they might surrender and exchange for certificates, interest computed from January 1, 1847.

Fifthly. In payment in full to the subscribers, making such advances, or their assigns, the *the* principal of the special stock issued to them for arrears of interest as aforesaid, with interest computed from January 1, 1853.

39 Sixthly. In payment in full to the subscribers making said advances, or to their assignees, of the principal moneys secured by each certificate charged as aforesaid over against the canal lands and tolls and revenues.

Seventhly. In payment in full to other holders of certificates of stocks by said act of 1847 directed to be issued and charged against said canal as aforesaid (such holders not being subscribers to the said advance), or their assignees, of interest at five per cent. per annum.

Eighth. In payment in full of interest in full on special stocks issued for arrears of interest as aforesaid to holders, or their assignees, who are not subscribers to said advance fund at five per cent., computed from January 1, 1853.

Ninth. In payment in full of the last-named stocks.

Tenth. To pay into the treasury of the State any surplus, after making the several payments in the nine preceding classes mentioned.

IX. And these defendants, further answering, admit that the said corporation accepted the said deed and the trust therein created,

40 and went into possession and dominion of the property by the said deed so conveyed, and thereby became vested with an equitable estate in the property so conveyed, not for any private gain of the said corporation, but for the purpose of providing payment for the aforesaid obligation, and for the purpose of completing the said canal, and for such other purposes as are mentioned and set forth in the acts of the general assembly of the State of Indiana aforesaid.

X. And these defendants, further answering, admit that at the time they accepted the legal title to said property under the provisions of the said deed, and in pursuance of the acts aforesaid there had been finished one hundred and eighty-nine miles of the canal, being that portion between the Ohio State line and Coal Creek, in the said State of Indiana. And they further admit that there remained to be finished by these defendants with the means provided by said acts, one hundred and eighty-six miles of said line of canal, being that portion between Coal Creek aforesaid and the city of Evansville, on the Ohio River, in said State; and that it was by said acts made the duty

41 of these defendants, as such trustees, to adopt and put into execution such plans and measures as should be deemed most expedient for the speedy completion of the canal to Evansville within the period required by the acts and the terms of the grants from the United States. And these defendants admit that the estimated cost of completing the said canal at the said date was about two millions of dollars, and that the means provided for such completion was the subscriptions or advances recited in said acts of the general assembly of the said State, and also seven hundred and ninety-three thousand four hundred and eighty-five (793,485) acres of land in the Vincennes district, donated by the United States, to be specially applied to such completion, but the lands in the Vincennes district, and the proceeds, were to be specifically applied to the construction of that part of the canal between the city of Terre Haute and the city of Evansville or the repayment of the money borrowed for that purpose.

XI. And these defendants further answering admit that about

42 the year 1854 the said defendants had fully completed the Wabash and Erie Canal to Evansville; and that the said work was prosecuted upon land which had been conveyed to the said defendants, or was by them condemned under the power of eminent domain granted in the act of January 27th, 1836, as recited in said bill of complaint.

XII. And these defendants, further answering, admit that the supply of water in that portion of the canal south of Terre Haute was inadequate, and that the means provided for furnishing said supply were frequently impaired or destroyed by floods, and that the navigation on said part of the canal south of Terre Haute was not fully maintained in consequence of said disabilities; they also say that the same was much impaired by domestic violence, by which the reservoirs, or water baisins, were destroyed; and that the use and value of said part of the canal was also very much impaired by reason of railway competition, authorized by the acts of the general assembly of the State of Indiana.

43 XIII. And these defendants, further answering, admit that about the year 1860, as in said bill charged, the use of the said canal south of Terre Haute, as a means of navigation, was substantially abandoned and has not since been resumed.

XIV. And these defendants, further answering, admit that the interest which it was contemplated by said acts should be liquidated out of the receipts of the canal, amounted to about the sum of three hundred and fifty thousand dollars ($350,000) per annum; and that the highest gross revenues from the business of the said canal, being in the year 1852, reached only the sum of one hundred and ninety-three thousand four hundred dollars ($193,400). And they admit that in the year 1859 these defendants, in the official report made by direction of law to the general assembly of the State of Indiana, admitted their inability to maintain the navigation in any portion of the canal; and that they had made certain repairs and maintenances, contracts with divers citizens of the State, whereby said citizens agreed to advance their own moneys to repair and protect said work, and look for
44 their reimbursement to the tolls and revenues.

XV. And these defendants, further answering, admit that that portion of the canal south of Coal Creek is now and for about the time charged in said bill of complaint has been practically abandoned, and that that portion of the canal in which navigation is maintained has been mainly kept up by local organizations along the line thereof, but that it is in bad repair, and would require a large expenditure of money to render it conveniently and reasonably fit for navigation, and that the revenues of the canal from navigation are inadequte to that purpose. The' further admit that the gross collections from tolls and water rents for the year 1871 is about the amount stated in said bill, namely, fifty thousand dollars, and that said receipts and collections are gradually becoming less each year.

XVI. And these defendants, further answering, admit that they are without means to repair the works on said canal sufficiently to
45 insure any large amount of business on the same, and that the local organizations which have heretofore to some extent kept up and maintained the repairs and navigation on that part of the canal extending from Coal Creek to the Ohio State line have declined to continue said aid, and that said canal is liable to fall into disuse and ruin; and these defendants admit the fact to be that said trust estate is unable, for the reasons herein stated, to meet the expectations entertained at the time of its creation, and that such inability appears by the report

made by these defendants to the general assembly of the State of Indiana for the year 1872, by which it is shown that the work of completing the extension of said canal and the yearly expenditures for repairs, renewals, and superintendence had absorbed the entire amount of the lands donated by the United States, except those remaining unsold at that time, which these defendants admit to be the least valuable of the lands donated by the United States, and not of a probable value exceeding fifty thousand dollars.

46 XVII. And these defendants, further answering, admit that by the decretal order of the circuit court of the United States for the district of Indiana, issued in 1860, at the suit of one John Ferguson, a holder of stocks issued in pursuance of the acts of the legislature of the State of Indiana, above referred to, these defendants as such board of trustees were restrained from applying any of the proceeds of lands sold or other assets remaining on hand, other than the tolls of the said canal, to the maintenance of said canal, its repairs or equipments.

XVIII. And further answering these defendants say that they have no knowledge of the amount, or class, or value of the stocks issued in pursuance of the acts of the general assembly of said State and payable out of the trust created thereby which are owned or held by the said complainant, except as in said bill of complaint alleged and set forth; and that the copy of said certificates of stock filed by the said complainant as an exhibit in his said bill of complaint is in the legal form of such certificates as authorized by said acts. And these defendants do

47 not deny that the said complainant is the holder of some portion thereof, but as to the amount these defendants ask that the same may be ascertained by this honorable court in such manner as it may direct. These defendants admit that no interest whatever has been paid on any of the stock certificates issued under the said acts, except those issued to subscribers to the eight hundred thousand dollars advance made for the completion of the canal to Evansville; and except also two years' interest upon the bonds or stocks issued for original Wabash, and Erie Canal bonds, according to the provisions of said act. And these defendants admit that upon said advance there is still due and unpaid a large amount of principal and interest, all of which will more fully appear in the exhibits which these defendants attach to their said answer. These defendants deny that the amount nominally outstanding for principal and interest charged upon the trust created in said acts, embracing the canal stocks and scrips issued, is over sixteen millions of dollars, but that it is about twelve millions, and they admit that the only security, therefore, is the said line of canal and the

48 undisposed property still held by these defendants as trustees under said acts, and the deed of the State of Indiana, made in pursuance thereof. These defendants admit that the canal stocks are held by numerous parties, widely scattered in this country and in Europe, particularly in England, Holland, and Germany; and they deny that it would be difficult to obtain the concurrence of a majority in number and value of such holders in the election of trustees under the provisions of said act. They admit that there has been no election by said holders for about nine years last past, and that the members of the board representing said holders remain in office by virtue of their last election, no others having been elected to supply their places, but such holding has been by the assent of the representatives of a majority of the holders of such certificates in number and value.

XIX. And these defendants further answering admit that it was the intent and design of said original and supplemental acts to se-

49 cure an adequate public highway through the said State of Indiana from Evansville to the Ohio State line, and also by the pledge of what was then esteemed a most valuable and rapidly increasing revenue, to provide an adequate security for the payment of one-half of the public debt of the State outstanding at the date of said acts and of the accrued interest on the same, together with the stated interest thereafter; and they believe it to have been the judgment of all parties concerned at that time that the tolls and revenues of said canal (if completed) would be more than sufficient to liquidate from time to time, as they matured, the instalments of interest, and yield a surplus to establish a sinking fund for the benefit of the State, to enable her to extinguish and take up the principal sum represented by said canal stock; and that said State in and by said acts reserved the equity of redemption in the said canal, and the right to annul and determine said trust by a payment of principal of certificates at any time after
50 twenty years from the passage of said act of January 19th, 1846.

XX. And these defendants further answering admit that by railway competition, and by casualties occurring to said canal, the business of said canal has been practically destroyed, so that no revenue whatever is produced therefrom, and that said State his not exercised the option which was reserved in said acts, but that in 1857, by her general assembly, she declared that it was not the purpose of the State to exercise such right of redemption; and that in the year of 1873, the said State by an amendment to her constitution adopted in due form expressly prohibited the general assembly in any manner or at any time from assuming or liquidating any portion of said canal stock or taking control of said canal as a public work of the State.

XXI. And these defendants further answering admit that it was intended by said acts that the general assembly of the State of
51 Indiana should at all times keep adequate and satisfactory control over said trust property and its management, and to that end the State should always appoint one member of such board of trustees, and should by certain reports and examinations of designated committees and officers exercise a supervision over the revenues of the said public work in which the State had such residuary interest as aforesaid. And these defendants say that the reports of the said trustees so provided for have been regularly and annually made by the defendants, trustees, and if the same have not been examined by the committee of ways and means of the general assembly of the said date for the time in said bill charged, or if the said auditor of the State during the said period has not made any statement or exhibition of the condition and working of the said trust as by law required, it is a fact unknown to these defendants, but these defendants aver that their said reports together with all the requisite vouchers and accounts have been
52 placed in the hands of the auditor of the State, and are on file in his office, from which the condition of the canal fund and canal lands are fully set forth up to the first day of October, 1874. The trustees state in regard to the semi-annual accounts and vouchers to be filed with the auditor as required by the said act, that there was an omission in the rendering of the same for several years, owing in part to the absence and illness of the chief clerk and in part to the abandonment of all interest in the canal on the part of the State authorities, and no requirement by them to render such accounts, but that the same have been fully supplied up to the first of October last, as above stated, and that no detriment to the trust has arisen or accrued from such omission.

XXII. And these defendants further answering say that the canal stocks created and authorized by the acts aforesaid were made transferable in the city of New York, in books therefor provided, that is
53 to say that certificate of stock issued for the principal of the bonds surrendered were made transferable only in books to be provided by the State at its agency in New York; and that certificates of stock issued for the bondholders' advances under the eight hundred thousand dollars provisions were issuable by and out of the office of the trustees in the city of New York, and that the interest on said stock and also the interest on certificates of stock issued for the interest on the State debt were made transferable in the office of the trustees in the city of New York, and have been regularly kept up. In regard to the transfers to be made in the office of the agent of the State, of certificates issued for the principal, the trustees have no official knowledge or information that the agency for the same has been discontinued.

XXIII. And these defendants further answering say that at the time the United States granted to the said State the several tracts of land donated in aid of the construction of the said Wabash
54 and Erie Canal it was contemplated that the said canal should be maintained perpetually to the use of the inhabitants of the State and all other persons as a public highway, free to the use of commerce on the payment of reasonable tolls; but whether such contemplated use and purpose is to be regarded in the nature of a compact between the said State of Indiana and the United States in that behalf, these defendants are unable to say. They admit that for the want of revenue, and on account of the condition of the said trust, these defendants are now, and for the past thirteen years have been, disabled, and prevented from maintaining such public highways in the manner contemplated by said grants; and they admit that their inability so to do has been to the prejudice of all the parties holding said canal stocks and securities, of which facts the State has been fully advised by the reports of the trustees made from time to time in pursuance of the said acts.

55 XXIV. And these defendants further answering admit that the corporate powers conferred upon them by the "acts" aforesaid are limited and restricted by divers conditions contained in the said act; but they deny that such limitations and restrictions have in any manner caused the failure on their part to keep up and maintain said canal; but that such failure has resulted solely from the loss of business consequent upon railroad competition, and the want of means outside of the tolls and income arising from the canal itself, which could be applied to that end, and which resulted in the present condition of the trust.

XXV. And these defendants further answering admit that the State of Indiana has abandoned all contingent interest in said canal so far as it was in her power so to do; and they also admit, that in consequence of the state of the trust and the abandoned and deteriorating condition of the canal and appurtenances, they are wholly unable
56 to carry out and effectuate the true intent of said trust, and that the further execution of the trust designed by said acts in the payment of the said stock so resting upon said property, or any accrued interest thereon, is, as these defendants admit, impossible.

XXVI. And these defendants further answering say that they are unable to state accurately the value of the said property still remaining in their hands; and they further say that it is not in their power to

state what might be accomplished in regard to said canal if the same were disposed of by these trustees, and should thereby pass into the hands of other parties; but they believe that by the aid of friendly legislation and local aid, such as might be rendered by those residing along and within the influence of the canal and its appurtenances, so much of the same as lies between Coal Creek and the Ohio State line might be made of great utility to the section through which it
57 passes, both for its navigation and water power; but these defendants admit, as they have already by their answer to other parts of this bill admitted, that it is not in their power longer to maintain the said canal as a navigable highway, so as in the remotest degree to make any provision for the holders of said canal certificates; but these defendants show that no powers were conferred upon them as such trustees by the acts of the general assembly of said State, creating said trust, to make any disposition whatever of said canal and its appurtenances except to use the same as a means of producing income to be applied in the payment of said certificates; and if the failure of the trust to accomplish the purposes for which it was originally designed, to wit, the payment and satisfaction of said certificates, and the consequent inability of the trustees to keep up and maintain said canal as a navigable public highway, capable of producing tolls and income applicable to the discharge of said trust, and the liability
58 of said property to deterioration, waste, and destruction has vested in the said complainant and others, holders of said canal stocks, the right to apply to a court of equity as cestui que trusts, and to invoke its powers to close up and discontinue said trust by marshaling the assets still held by these defendants and applying them to the payment of the several holders in order of their priorities, these defendants would ask that such orders and decrees may be rendered in the premises as will from time to time enlarge their powers as such trustees so as to enable them under such orders to make complete and final settlement of said trust and an equitable distribution of the assets thereof among the parties who, by the orders and decrees of this court, may be entitled to receive the same.

XXVII. And these defendants admit that it is right and proper that an account be taken of the amount, classes, and priorities of said stocks issued under the aforesaid acts either original or of reissue, and
59 also of the amounts now justly due for principal and interest upon all such classes of stocks; and these defendants are ready and willing to furnish as this court may direct all such information, and as far as possible also the names of the different holders and the amounts severally due to each of them; but as to an account of the transactions of said trust from its origin until the present time these defendants, answering, say that the same with all the necessary vouchers, documents, and proofs are embraced in the reports made by these trustees in pursuance of the provisions of the said acts of the general assembly to the proper authorities of the State of Indiana and are on file in the office of the auditor of said State; that the last of said reports so made by these defendants embraces the year 1874 and bears date January 20th, 1875, a copy of which is filed herewith, marked Exhibit A, and made a part of this answer, in which reports are shown the different receipts and disbursements, and on what account made, and the present condition of said canal fund, as also of the assets of said canal, and of what
60 they now consist, and in whose hands they are. The present condition of said canal funds and assets is fully set forth in the said Exhibit A, to which these defendants refer for greater certainty.

XXVIII. And these defendants, further answering, say that during the time the said trust has been under administration no waste or loss or destruction of any of the property or estate entrusted to the said corporation has ever been suffered to take place; that the deterioration in value of the property entrusted to them and the failure of the trust to accomplish the purposes for which it was originally designed in no manner rests upon any default of theirs, but has grown out of the facts more specifically set forth above in this answer, and therefore they respectfully submit to this honorable court that these defendants, by their familiarity with the nature and character of the trust property and their knowledge of its present condition, are able, if it be the decree of the court that the same should be sold, to execute the orders of the
61 court in the premises and close up and settle said trust; that it has at all times been their purpose to administer the same, as far as it was in their power so to do, for the benefit of the cestui que trust; and in the orders and decrees that may be entered by this court, if upon final hearing it should be deemed advisable to make final and complete settlement thereof, these defendants ask that the interest of all the bondholders, in the order of their equities and classes, be fully protected by this court.

XXIX. And these defendants also deny that there is any other matter or thing material or necessary for them to make answer unto, and not herein or hereby well or sufficiently answered into, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct.

McDONALD & BUTLER,
*Att'ys for the Board of Trustees of the Wabash and Erie Canal.*

62 UNITED STATES OF AMERICA,
*District of Indiana, ss:*

Thomas Dowling, being duly sworn, says that he is one of the board of trustees of the Wabash and Erie Canal, the defendants in the above-entitled action; that he has heard read the foregoing answer therein by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information or belief of the defendants, and that as to these matters he believes it to be true.

THOS. DOWLING,
*Trustee, &c.*

Subscribed and sworn to this 2d day of April, 1875, before me.
J. D. HOWLAND, *Clerk.*

63 And afterwards, to wit, at the May term of said court, on the 2nd day of July, 1875, before the Hon. Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by Mr. Claypool, his solicitor, and by leave of the court files his replication in the words following, to wit:

*Replication.*

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said de-

fendant, for replication thereunto, saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant, without that any other matter or thing in the said answer contained materially or effectually in the law to be replied unto and not herein and hereby well and sufficiently
64 replied unto, confessed, or avoided, traversed or denied is true; all which matters and things this repliant is ready to aver, maintain, and prove as the honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

CLAYPOOL & KETCHAM,
*For Repliant.*

And afterwards, to wit, at the May term of said court, on the 17th day of July, A. D. 1875, before the honorable David Davis and the honorable Thomas N. Drummond, judges, the following further proceedings in the above-entitled cause were had, to wit:

This cause now coming on to be heard upon bill, answer, replication, and exhibits, the complainant appearing by Mr. Claypool and Mr. Ketcham, his solicitors, and the board of trustees defendant, by Mr. J. E. McDonald, Mr. H. Crawford, and Mr. Masbury, its solicitors, and the said cause having been argued by counsel, it is ordered and decreed that the holders of the different stocks specified in the said bill of complaint are entitled to have the said trust property appropriated
65 to their benefit in accordance with their several rightful priorities as they may hereafter be determined by the court; and the court further find and decree that the said trust property is subject to deterioration and waste in its present condition and for that reason the said trust should be as speedily as practicable wound up for the benefit of all entitled.

And for that end it is ordered, adjudged, and decreed that Charles Butler, Thomas Dowling, and James D. Hinton, who now compose the Board of trustees of the Wabash & Erie Canal, be, and they are hereby, appointed trustees to hold and administer said trust property now in their hands under the order and direction of the court from time to time, and to make such disposition of the said trust property in the bill described and its tolls, income, and proceeds as they may be directed to make by the court hereafter.

And it is further decreed by the court that Hon. Samuel B. Gookins be, and he is hereby, appointed special master, to take the accounts of said trustees, and to take proofs, under such regulations and no-
66 tice as he may deem best, of the amount of all stocks outstanding and included in the trust set out in the bill, and the names of the several holders thereof, and the amounts held by each and the class thereof, and also to state fully and precisely the amount of each class of stock, and the priorities of each and every of such classes of stock upon the said canal, or income or lands, or either or any of them, and, having taken such account, he shall report the same unto this court for the purpose of finally settling the different equities of all and singular the scrip holders upon said trust property. And the trustees hereby appointed are directed under the orders of the special master to make out and report to such special master as speedily as practicable an inventory of all and singular the assets of every kind in their possession or under their control belonging to said trust, and if, in their judgment,

any of the property now in their custody ought to be speedily sold, it shall be their duty to report such fact to the court, together with the recommendation of such special master as to the expediency of
67 such immediate sale, for such action as the court may, upon proper application, order and decree.

And the said trustees hereby appointed are directed to maintain the property and income from the same as it may from time to time accrue, under the sole direction of this court herein, and are directed and required to make no payments out of any trust funds in their hands except for the purpose of discharging the necessary and proper operating expenses by them incurred in managing such trust property and in discharging this trust, unless such payments are hereafter specially ordered to be made by decretal order herein, and the trustees are hereby required to report to said special master and this court from time to time their receipts and disbursements in and about the discharge of their trust herein.

And the trustees and said special master are hereby directed to make speedy and full examination, and report to this court with all convenient speed, as to the best method of finally closing the said trust and the
68 best manner of disposing of the said trust property so as to produce the largest available sum for the benefit of all the cestui que trust; and all other equities are hereby reserved for the further orders of the court.

July 17th, 1875.

DAVID DAVIS.
THOMAS DRUMMOND.

And afterwards, to wit, at the November term of said court, on the 24th day of December, 1875, before the Hon. Thomas Drummond and Hon. Walter Q. Gresham, judges of said court, the following further proceedings in the above entitled cause were had, to wit:

Comes now Samuel B. Gookins, special master herein, and files his report in the words following, to wit:

Comes now the complainant, by Claypool and Ketcham, his solicitors, and the defendant comes by McDonald and Butler, its solicitors, and also comes the Hon. S. B. Gookins, special master hereinbefore appointed, and the said master and the trustees make and file their
69 report, as hereinbefore directed by order herein made; and this cause coming on to be further heard, and being duly considered by the court, it is ordered, adjudged, and decreed that the Wabash and Erie Canal, including its banks, margins, tow-paths, side cuts, feeders, basins, rights of way, locks, dams, water powers, and structures, together with all its appurtenances, also all lands and lots now belonging to the trust and vested in the board of trustees of the Wabash and Erie Canal, and franchises, except as hereinafter specified, be sold as follows: All of that part of the main line of the canal, extending from the western boundary of the city of Lafayette eastward to the Ohio State line, including its banks, margins, tow-paths, and side cuts, feeders, basins, right of way, locks, dams, water powers, and structures, and lots and lands used as sites for water powers, and franchises, to be offered in a body at a public sale, and if a satisfactory bid be not made for the same, then the said property be sold in the sections and divisions following, to wit:

70 1ST DIVISION.—From the western boundary of the city of La-

fayette to the east line of the piers of the Carrollton bridge in the county of Carroll, including the dams across the Wabash River at Pittsburgh, and across Deer Creek and Wildcat Creek, with all the appurtenants as above specified, the main line of this division being about 22 miles in extent.

2ND DIVISION.—From east line of the piers of the Carrolton bridge to the western boundary of the city of Logansport, a distance of about 17 miles.

3D DIVISION.—From the western boundary of the city Logansport to the west end of lock number nineteen, including the Peru dam and feeder, a distance of about (19) nineteen miles.

4TH DIVISION.—From the west end of lock number nineteen at Peru to the west end of the lower lock at Lagro, including the Lagro dam and feeder, a distance of about twenty-one miles.

5TH DIVISION.—From the west end of the lower lock at Lagro to the west end of the lock at Roanoke, a distance of about twenty-two miles.

6TH DIVISION.—From the west end of the lower lock at Roan-
71 oke to the crossing of the Pittsburgh, Fort Wayne and Chicago Railroad, a distance of about thirteen miles.

7TH DIVISION.—From the crossing of the Pittsburgh, Fort Wayne and Chicago Railroad to the Ohio State line, a distance of about twenty-one miles.

All the remainder of the line of said canal from the western boundary of the city of Lafayette to the terminus of the canal at Evansville shall be sold in separate sections or divisions, each division to include that portion of the main line of the canal in each county respectively through which it passes, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, locks, dams, water powers, and structures, but not however including lands which have been used and occupied as reservoirs, which lands shall be sold as hereinafter directed. And from that division of the canal which passes through Vigo County shall be excepted all of that part of the canal lots and lands which lies within the present corporate limits of the city of Terra Haute; and from that division of the canal which passes through Vander-
72 burgh County shall be excepted that part of the canal lots and lands which lies within the present corporate limits of the city of Evansville and the city limits of Evansville as were used, being intended to embrace the town or city of Lamasco. The said parts of the canal and the lands and lots lying within the corporate limits of the city of Terre Haute and of the city of Evansville, are at present reserved from sale until the further order of this court. Also all other lands and lots belonging to the trust, including those donated by the United States to aid in the construction of the canal, and not heretofore disposed of, and also all other lands which had been used
73 as sites for reservoirs, to be sold in separate parcels. Said sales shall be made by the special master in chancey heretofore appointed in this cause, and the resident trustee at Terre Haute, after having been duly advertised six weeks by publication in a newspaper or newspapers, in the discretion of the master & trustee aforesaid, of general circulation, printed and published in each of the following cities, to wit, in New York, in the State of New York: in Toledo, in the State of Ohio; in Fort Wayne, Lafayette, Terre Haute, and Evansville, in the State of Indiana. The said sales to be made at the court-house door in the city of Terre Haute, Indiana. Said sale to be made upon the following terms and conditions, to wit, ten per cent. of the purchase money to be paid in cash upon confirmation of the sale, & the remainder within

one year from that time, with interest at six per cent. per annum, with approved security.

It is further ordered that the sale made to Theodore Hudnut, John S. Beach, and Ray G. Jenks of a parcel of land in the city of Terre
74 Haute, by the trustees and special master, as set forth in their report, be confirmed, and said trustees are hereby directed to convey the same upon payment of the purchase money.

It is further ordered that the resident trustee at Terre Haute, and the special master, shall invest the funds now in the hands of the trustees and such as shall hereafter come to their hands from the proceeds of sale of real estate or other sources in U. S. 5-20 bonds.

It is further ordered that the resident trustees at Terre Haute and the special master proceed with all reasonable dispatch to enforce & collect in such a manner as shall seem for the best interest of said trust estate, all outstanding claims in favor of said estate, whether of open accounts, notes, or other choses in action.

And the said special master & resident trustee shall make due report of their acts and doings under this decree to the court, and all other questions are reserved.

75 And afterwards, to wit, at the November term of said court, on the 23d day March, 1876, before the Hon. Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above entitled cause were had, to wit:

*Entry.*

Now come the parties, by their solicitors aforesaid, and also come Samuel B. Gookins, special master in chancery, and Thomas Dowling, resident trustee, and the said special master in chancery and resident trustee file their report of the sale of the said canal and lands and lots, with a schedule thereof, containing a description of the canal, and lots and lands sold, the names of the purchasers of the several parcels and divisions, and the amounts respectively bidden therefor, and the court being sufficiently advised of and concerning the premises, doth now order, adjudge, and decree that said sale, as to that piece or parcel of land situate in the county of Allen designated as follows: Northeast quarter of St. Joseph dam, about two acres and sixty hundre'ths of an acre which was at said sale struck off to James Lillie, at the sum of
76 forty dollars, and also, as to that certain other piece or parcel of land situated in the county of Miami, described as follows, at lock number twenty on berm side, ten chains up the canal, three or four acres, acquired under treaty with the Miami Indians in 1826, which was struck off to the Indiana Manufacturing Company at seventy dollars, be, and each of them is, not confirmed, but that said sales and each of them be set aside.

And it is further ordered, adjudged, and decreed that all the residue and remainder of the said sales, as set forth in the said report, and in the schedule made a part thereof, be, and the same are hereby, ratified and confirmed, reserving all just rights and equities of the respective purchasers.

And it is further ordered, adjudged, and decreed that the said special master in chancery and resident trustee, in taking notes for the deferred payments, on account of the said purchases, make the same payable to Charles Butler, president of the board of trustees of the Wabash and Erie Canal.

And it is further ordered, adjudged, and decreed that upon pay-
77 ment of ten per cent. in money of the amount of the consideration upon each of the several sales aforesaid, and upon giving satisfactory personal security for the remainder of the purchase money, payable one year after date of this order, with interest at the rate of six per cent. per annum, the said Samuel B. Gookins, as such special master in chancery, and the said Thomas Dowling, trustee, convey the property purchased to each of the said purchasers respectively, in fee simple.

It is further ordered that the order heretofore entered authorizing and directing the repair of the St. Joseph dam and at the aqueduct across the St. Mary's River is not abrogated or rescinded by this order, but that the same is to be carried into effect.

And now comes into open court Jonathan K. Gapen, and represents to the court that since the filing of the report of the sale of the canal and lands, he has assigned and transferred his said bid and purchase of the canal from the western boundary of the city of Lafayette to
78 the Ohio State line to William Fleming, of Fort Wayne, Indiana; and the said William Fleming also appearing, by R. S. Taylor, esquire, his solicitor, and agreeing thereto, and the said special master in chancery and resident trustee having accepted the said William Fleming as such purchaser, it is now ordered that the said William Fleming be substituted as, and he is hereby declared to be, the purchaser of that portion of said canal above named with its appurtenances as set forth in said report, at and for the sum of eighty-five thousand and five hundred dollars; and said William Fleming also comes, by R. S. Taylor, his solicitor, and files a petition in relation to certain lands claimed by him to be part of the main line of said canal purchased by him, which petition is in these words: Upon which it is ordered that the matters contained in said petition be reserved for further consideration, and that in the meantime confirmation of the sale of the parcels of land mentioned in said petition be suspended.

79 *Report of sale.*

The undersigned, Samuel B. Gookins, special master in chancery, and Thomas Dowling, resident trustee, respectfully report that pursuant to the order and decree of this honorable court ordering and directing them to offer for sale at public auction the Wabash and Erie Canal and the lands and lots mentioned in said decree, they advertised said property for sale at public auction at the court-house door in the city of Terre Haute, in the county of Vigo, on the 24th day of February, 1876, by publishing notices of said sale, with a description of the canal lands and property to be sold and the terms of sale in the following-named newspapers, to wit: In the Toledo Commercial, of Toledo, Ohio; the Fort Wayne Sentinel, of Fort Wayne, Indiana; the Lafayette Courier, of Lafayette, Indiana; the Terre Haute Express, of Terre Haute, Indiana; the Evansville Courier, of Evansville, Indiana; and the New York Times, of the city of New York, which advertisements were published for the length of time required by said order and decree, a copy of which advertisement
80 is appended to this report. That at the time and place appointed for said sale they offered for sale at public auction the said canal and lands and lots upon the terms set forth in said advertisement. That upon so offering for sale the canal with its appurtenances as described, extending from the western boundary of the city of Lafayette to the Ohio State line, the highest bid received therefor was sixty-six thousand dollars. Thereupon that part of said canal was in like manner

offered for sale in sections and divisions as set forth in said advertisement, and the aggregate of all the bids received therefor amounted to the sum of sixty-seven thousand one hundred and seventy-five dollars ($67,175). Nine of these bids being satisfactory that portion of the canal with its appurtenances was again in like manner offered for sale in a body, and the same was sold for the sum of eighty-five thousand and five hundred dollars ($85,500), as set forth in the schedule hereto annexed and made a part of this report. The remainder of said
81 canal and lands and lots was then offered for sale in sections and divisions and in parcels according to the respective descriptions as set forth in said schedule, at which sale said canal, lands and lots were struck off and sold to the persons whose names are set forth as purchasers in said schedule of the said divisions, lands and lots respectively, at the respective prices therein stated, such persons being the highest bidders, and the amounts stated being the highest bids for the same.

The undersigned would further report that at said sale a tract or parcel of landdescribed as northeast corner of St. Joseph's dam, about $2\frac{60}{100}$ acres, being in Allen County, was struck off to James Lillie at forty dollars ($40), as indicated by the foregoing description. The said land is located very near the dam above mentioned. The said dam was greatly injured by the recent high water, as shown by our report made in this cause on the 23d day of February last, upon which report an order was made by this honorable court to repair the breaches set forth
82 in said report. Since said sale the chief engineer, Jesse L. Williams, has notified the undersigned that the said parcel of land was necessary to be retained as a site from which to obtain earth and gravel with which to make said repairs, notice of which has been given to the said bidder. We are advised that the land is of very little value for any purpose other than for the one indicated. It was expressly stated in the published notice and proclaimed at the time of offering the property for sale, that all sales were subject to approval by the court. We would therefore respectfully recommend that the sale as to said tract be not confirmed, but that the same as to said tract be set aside.

The undersigned further report that at said sale a tract or parcel of land situated in the county of Miami, described as follows, to wit: At lock number 20, on berm side, ten chains up the canal, exclusive of canal, three or four acres, acquired under treaty with Miami Indians in 1826, was struck off to the Indiana Manufacturing Company at the sum
83 of seventy dollars ($70), that being the highest price bid for the same. From information since received, the undersigned are satisfied that the amount so bid for said tract of land was grossly inadequate, and that said property is worth and will sell for from two to four thousand dollars. We therefore respectfully advise and recommend that said sale as to said tract be not confirmed, but that the same be set aside. Notice of this recommendation has been given to the said bidder. As to all the residue and remainder of the said canal and lands and lots the undersigned respectfully report the sales thereof, as set forth in said schedule to this honorable court for confirmation and for such further order and direction in the premises as to this honorable court shall seem mete

We recommend that, as a matter of convenience, the notes to be taken for the deferred payments upon the several properties sold, be made

payable to Charles Butler, president of the board of trustees of the Wabash & Erie Canal of the City of New York.

84 S. B. GOOKINS,
*Special Master in Chancery.*
THOS. DOWLING,
*Resident Trustee W. & E. Canal.*

Schedule of lands sold.

All that part of the main line of the Wabash and Erie canal extending from the western boundary of the city of Lafayette eastward to the Ohio State line, including its banks, margins, tow-paths, side cuts, feeders, baisins, rights of way, locks, dams, water power, and structures and all lots and lands used as sites for water-powers and franchises, sold to Jonathan K. Gapen for eighty-five thousand five hundred dollars ($85,500).

85 And afterwards, to wit, at the November term of said court, on the 6th day of June, A. D. 1876, before the Hon. Thomas Drummond and Hon. Walter Q. Gresham, judges of said court, the following further proceedings in the above entitled cause were had, to wit:

*Entry.*

Come now the special master and the trustee herein and file their report in the words following, to wit:

*Report.*

The undersigned Samuel B. Gookins, special master in chancery, and Thomas Dowling, resident trustee, respectfully report: That, pursuant to the sale of the canal and lands, as heretofore reported to this honorable court, and to the order of the court confirming such sales and ordering and directing the undersigned to convey said canal, lots, and lands to the purchasers, respectively, upon their complying with the terms of the sale, they have conveyed to the said purchasers, respectively, that portion of the said canal and lands as set forth in a schedule herewith filed and made a part of this report, designated as Exhibit A, the said purchasers having each paid ten per cent. in money upon the amount of their respective bids, and executed their notes, with
86 security approved by us, for the remainder of the purchase money, payable to Charles Butler, trustee, as set forth in said report.

The undersigned would further report that after the filing and confirmation of their report of sales heretofore made, William Fleming, to whom, as assignee of Jonathan K. Gapen, that part of the canal extending from the western boundary of the city of Lafayette to the Ohio State line, had been conveyed, filed his petition in this court, claiming that certain of the lots and lands sold to other persons were appurtenances of the canal, and that they were conveyed by and included in the deed made by the undersigned to him of the above-mentioned portion of the canal. In consequence of that claim having been interposed by the said William Fleming, the undersigned have not insisted that the purchasers of the lots and lands so claimed should pay the money and execute the notes and accept deeds for the lots and lands so claimed. We were induced to take this course from the fact that some of said purchasers declined to complete their purchases until such claim should be settled and adjusted, and from the further fact that, as they believed, the matters involved would be more complicated by adopting a different

87 course than by the one adopted by them. The undersigned, in this behalf, would state that the said portion of the canal and the said lots and lands were advertised separately in the same advertisement, and were sold at the same time and place separately, and that the said Jonathan K. Gapen was present and bid upon the said canal and most or all of the said lots separately from the canal. The undersigned recommend that the matter of said claim be adjusted and settled by the court as speedily as possible, to the end that they may close up with the respective purchasers without delay. A schedule of the lands and lots claimed by the said William Fleming is filed herewith, designated as Exhibit B.

The undersigned would further report that some time before the filing and confirmation of their report of the sale of the canal lots and lands, the undersigned, special master in chancery, sent a notice to each of the several purchasers at said sale at their respective post-office addresses, as furnished by them at the time of their purchases, notifying them that the report of such sale would be submitted to this court on the 23d day of March then next ensuing, for confirmation. Said

88 report was submitted at that time, and said sales were, by an order of this honorable court, confirmed, none of the respective purchasers having, in any manner, excepted to such report nor interposed any objection to its confirmation. Nevertheless a large number of the purchasers of portions of the canal and of lands and lots have not complied with the terms of said sale. A schedule of such purchases, with a description of the property purchased, the amount bid for each parcel, respectively, and the name of the bidder, is herewith submitted, designated as Exhibit C. The undersigned respectively submit the matters in this behalf to this honorable court, and ask that such order and direction be made and given as to the court shall seem mete touching the matters aforesaid.

The undersigned would further report that besides the lands mentioned in schedules B and C, annexed to this report, there yet remains certain other portions of the canal and lots and lands, of which no final disposition has been made. Among these are certain lands the sales of which were, pursuant to the recommendation of the undersigned, not confirmed, for the reason that the bids for the same were

89 deemed inadequate. Others were, by the order of the court, reserved from sale when the decree ordering and directing the sale was made, for the reason that certain leases and agreements had been made and entered into by the board of trustees with sundry persons before the making of the original decree in this cause, by which certain portions of the bed of the canal, in the cities of Terre Haute and Evansville, had been demised, with the privilege of the lessee to purchase the same at the appraised cash value thereof, as will appear by a report heretofore made in this cause. The undersigned respectfully recommended that an order be made empowering and authorizing the undersigned to execute these contracts, and to sell, either at public auction or at private sale, and to convey all the remaining lots, lands, parts or portions of the canal which remain unsold or unconveyed as in their discretion shall seem best, and that such order and decree be made in the premises as to the court shall seem mete.

All which is respectfully submitted.

S. B. GOOKINS,
*Special Master in Chancery.*
THOS. DOWLING,
*Resident Trustee.*

90 EXHIBIT A.

Schedule of lands and lots conveyed in pursuance of sale made Febr'y 24th, 1876, with statement of notes and cash received in payment therefor.

All that part of the main line of the Wabash and Erie Canal extending from western boundary of the city of Lafayette, eastward, to the Ohio State line, as more particularly described in the report of sale, conveyed to William Fleming, assignee of Jon. K. Gapen, by deed, 1876.

*Notes.*

| | |
|---|---|
| Wm. Fleming, Jas. Lillie, O. A. Simons, J. H. Bass, and Bippus & Simonton, for | $33,245 39 |
| H. J. Shirk, A. N. Dukes, E. H. Shirk, and Wm. Fleming, for | $32,050 05 |
| C. B. Knowlton, Rufus Magee, J. W. Dritt, Wm. Dolan, and Wm. Fleming | $11,654 56 |
| Amounting to | 76,950 00 |
| Cash, 10 % of purchase | 8,550 00 |
| | $85,500 00 |

* * * * * * *

And afterwards, to wit, at the November term of said court, on the 12th day of February, 1877, before the Hon. Thomas Drummond and Hon. Walter Q. Gresham, judges of said court, the following further proceedings were had, to wit:

91 Come now, on this twelfth day of February, A. D. 1877, the complainant, by his solicitor, honorable S. Claypool, and the surviving trustee, Charles Butler, and James S. Hinton, by McDonald and Butler, their solicitors, and the petition of said Butler and Hinton, filed in this cause on January 12th, 1877, is now submitted to the court for hearing and final order thereon. And the court having considered said petition, and being fully advised in the premises, it is ordered that the said Charles Butler and James S. Hinton, as surviving trustees herein, and honorable S. B. Gookins, special master in chancery herein, and the legal representative of Thomas Dowling, deceased, late trustee herein, do each, on or before the first day of April, A. D. 1877, make and file with the clerk of this court a full and final settlement, report and accounting of and for all the business, moneys, assets, and property of, or in any manner belonging to, said trust that has come into their hands, or into the hands of any one of them, together with an account of the disbursements thereof, and their respective claims for services rendered herein and the said settlement accounts may be rendered separately when the same shall be necessary.

92 And it is further ordered by the court that Hon. S. B. Gookins be, and he is hereby, appointed sole receiver to take, receive, and hold the moneys, assets, & property of said trust, and to complete the full and final settlement thereof, and distribution of the proceeds thereof, under and in accordance with the orders of this court; and the said S. B. Gookins, before entering upon the duties of his said receivership, is hereby required to give bond in the penal sum of one hundred and fifty thousand dollars, conditioned for the faithful performance of the duties of said trust, and the full accounting for all moneys, assets, and prop-

erty belonging thereto, with personal security to the satisfaction of this court, or one of the judges thereof, and upon the execution of such bond by said S. B. Gookins, the said Charles Butler, James S. Hinton, S. B. Gookins, and the legal representative of the estate of Thomas Dowling, deceased, are hereby ordered and directed to pay and deliver to said S. B. Gookins all the moneys, assets, and property of, or in any manner belonging to, said trust. And it is ordered that the receiver have power to sue for & collect all outstanding liabilities belonging to said
93 trust, & to sell all the remaining unsold property of the trust in accordance with the terms of the decree hereinbefore made, except credit shall not be given for a longer term than six months from the date of sale. And it is further ordered that the said receiver, within thirty days after qualifying as such, shall file with the clerk of this court a full statement of all the assets of every kind which shall come to his hands or under his control, and on the first of every month thereafter shall also file with the clerk a full account & statement of all his acts and doings as such receiver during the previous month, all of which shall be referred to the master for his examination and report thereon to the court.

And afterwards, to wit, at the May term of said court, on the 7th day of July, 1877, before the Hon. Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above entitled cause were had, to wit:

*Entry.*

Come now James Spears and others and file herein their cross-bill in the words following, to wit:

*Cross-bill of Spears & Case.*

James Spears, for himself and as the surviving partner of the late firm of Spears & Case, John S. Case, James S. Case, Reed Case,
94 Charles G. Case, Josephine C. Schermerharn, and Bernard F. Shermerharn, her husband, and Huldah E. Case, the children and widow of Reed Case, late of the county of Carrol, in the State of Indiana, deceased, and also Waldo W. Williams, legatee of the said Reed Case, complaining of the original plaintiff and defendants in this action, and of Samuel B. Gookins, appointed by and acting under the authority of this court as a receiver in the premises, and Elbert H. Shirk, H. J. Shirk, A. N. Dukes, all of Peru, in said State of Indiana, Thomas J. Trunrel, William Dolan, Jacob W. Dritt, and Charles B. Knowlton, Enoch Rinehart, and Abner H. Bowen, show to the court that by virtue of an act of the legislature of the State of Indiana, approved January 20, 1842, it was made the duty of the engineer or other person having charge of the Wabash & Erie Canal, on or before the first day of May then next ensuing, to let by contract to the lowest bidder the clearing out and removing all obstructions from the bayou which extends from the said canal, at the town of Delphi, county of Carrol, and State of aforesaid, to the Wabash River, for the purpose of creating water power upon the said canal at said place; that by the second section of said act it was further provided that said engineer
95 or other person before letting the said work, should give public notice of the terms and conditions, and also the time of the said letting by publishing the same in the newspaper printed in the said

county for two months at least previous to the time of the said letting, and it was provided by a proviso to said section that the said work should be completed within six months from the time of the said letting; that it was further provided by the third section of the said act that the said engineers, or person having charge of that part of the canal, should cause the work to be estimated when the same was completed, and should give to the person doing the same a draft or other evidence of indebtedness specifying what the same was given for, and the amount due him as by the contract; and for the purpose of paying for the said work, the rents that may be received by the State for water power created by said act should be appropriated to that purpose, and to no other purpose; and that the person or persons doing the said work should look to the said rents for their pay, and to no other source, whatever; and as fast as the said rents should become due and be received they should be expended in paying for the said work,
96 until the whole amount was paid; that it was further provided by the fourth section of the said act that as soon as the said work was let to some responsible person it should be the duty of the said engineer or other person to lease out a portion of the water power by said act created, not exceeding in all what would be sufficient to propel thirty run of stones, on the same terms and the same price and conditions as water power under similar advantages was leased at other places upon said canal, and it was also made the duty of the said engineer or other persons to give two months' notice prior to the said leasing of the said water power; that by the fifth section of the said act it was made the duty of the said engineer or other person, as the agent on behalf of the State, to purchase of the owner or owners of the land lying adjacent to the place where the said water power was to be located such real estate, not exceeding in all four acres, as might be necessary to carry into effect the provisions of said act in the manner and upon the terms and conditions therein specified, the title to which was to be vested in the State of Indiana; that pursuant to the provisions of the said act,
97 Stearns Fisher, the engineer of the said canal, and as the agent of the State of Indiana, made and entered into a contract with James Spears, of the county of Tippecanoe, and Reed Case, of the county of Carrol, to construct and complete the said work, as provided for by the said act of the legislature, and in accordance with the plans and specifications then agreed upon; that said Spears and Case completed the said work within the time prescribed by the act, and in strict accordance with the terms of the said contracts, plans, and specifications; that on the 19th day of January, 1846, an act entitled "An act authorizing a settlement with Spears and Case for work done on the side cut at Delphi, in Carrol County," was passed by the general assembly of the State of Indiana, whereby it was made the duty of the officer having charge of the Wabasn and Erie Canal east of Tippecanoe, as soon thereafter as possible, to make a settlement with Spears & Case for work done by them under an act entitled "An act relative to water power at the town of Delphi, Carrol County," approved January 20th, 1842; and to give to said Spears and Case a certificate for the amount of work done by them under said act,
98 which should be paid out of the rents received from the water power created by the side cut constructed by the said Spears and Case near said town, and that said certificate should draw six per cent. interest from the time the said contract was completed by the said Spears & Case until payment thereof should be made; that on the 29th day of September, 1847, Stearns Fisher, general superintendent of the

Wabash and Erie Canal, and having charge thereof at said place, made an estimate of the said work done by the said Spears & Case, under and pursuant to the said act, and who gave to them a certificate to the effect that the work done by them was of the value of ten thousand three hundred and fifty-four $\frac{20}{100}$ dollars, and that the said sum of money so found to be due would draw interest at the rate of six per cent. per annum from and after the first day of December, 1843 (a copy of which certificate is herewith filed and hereof made a part, marked Exhibit A); that on the 29th day of May, 1846, Stearns Fisher, general superintendent of the Wabash and Erie Canal, made and entered into a contract with George Robertson for the use of a sufficient water power to propel three run of stone, (a copy of which lease is herewith
99 filed, and hereof made a part, marked Exhibit B), and that Enoch Rhinehart is the present assignee and lessee of said run of stone that on the 5th day of July, 1852, Thomas Dowling, resident trustee, acting for and on behalf of the board of trustees of the Wabash and Erie Canal, executed to James Spears, Reed Case, & James P. Dugan, a lease for the term of thirty years from and after the first day November, 1852, sufficient water power to propel three run of stones (a copy of which lease is herewith filed, marked Exhibit C, and made a part hereof), and that Abner H. Bowen is the present assignee and lessee of said run of stone; that the said lessees and their assigns have, from the time aforesaid down to the present time, occupied, used, and enjoyed the said water power, and now use, occupy, and enjoy the same, under and by virtue of the said leases, so executed as aforesaid; that the rents derived from the use of the said water power, under and by virtue of the said leases, have been paid to the said Spears & Case, from the time aforesaid down to the 1st day of November, 1875; that the sums received by the said Spears & Case amount to in the aggregate *to* the sum of eighteen thousand eight hundred and seventy-one dollars and
100 seventy-five cents ($18,871.75), as will be more fully made to appear by a tabular statement showing the times when and the sums received, herewith filed, marked Exhibit D, and hereof made a part; that in said tabular statement the interest has been computed upon the sums so found due as aforesaid, to the time when the first payment was made, at which time the said payment was deducted from the principal and interest then due, and the said statement is made in the same manner down to and including the last payment which has been made thereon, from which statement it is made to appear that there is now due to the said contractors the sum of twenty-four thousand six hundred and seventy-eight $\frac{86}{100}$ dollars.

That under and by virtue of an act entitled "An act to provide for the funded debt of the State of Indiana and for the completion of the Wabash and Erie Canal to Evansville," approved January 19th, 1846, and a supplemental act in reference thereto, approved January 27th, 1847, the State of Indiana sold, assigned, and transferred to certain trustees for and on behalf of the bondholders of the State of Indiana all the right, title, and interest of the said State in and to
101 the said canal and the certain lands belonging thereto (subject, nevertheless, to all existing rights and equities against the State on account of the same or any part thereof or liabilities of the State growing out of or in relation thereto), all of which will more fully appear by the said acts and the complainant's answer and exhibits filed in the original action herein; that said trustees provided for in said act, under and by virtue of the said acts, took possession of the said canal and of the said lands belonging thereto, and have from said time, down to the

filing of the original bill in the present action, had the possession, control, and management of the said canal and the said lands, the particulars whereof will more fully appear from the original complaint, answers, and exhibits filed in this action; that on the 24th day of December, 1875, this court, in an action where Jonathan K. Gapen was plaintiff, and the board of trustees of the Wabash & Erie Canal was defendant—the complaint, answer, and reply in said action are here referred to and hereof made a part—ordered, adjudged, and decreed that the said canal, with all its appurtenances and appendages thereto belonging, together with all lands transferred by the said State to the said trustees remaining unsold, should be sold at public auction,
102 on the terms and conditions therein specified; that said order and decree provided that "all that part of the main line of the canal extending from the city of Lafayette eastward to the Ohio State line, including its banks, margins, towpaths, and side cuts, feeders, basins, right of way, locks, dams, water-powers, and structure, and lots and lands used as sites for water powers, and franchises, be offered in a body at public sale, and if not sold in a body, to be sold in sections as follows: 1st division, from the westward boundary of the city of Lafayette to the east line of the piers of the Carrol bridge, in the county of Carrol, including the dam across the Wabash River at Pittsburg and across Deer Creek and Wild Cat Creek, with all the appurtenances as above specified, the main line of this division being about 22 miles in extent; and that Samuel B. Gookins, special master in chancery, was appointed to make the sale; that in pursuance of the said decree the said canal extending from the western boundary of the city of Lafayette to the Ohio State line (which decree is here referred to and made a part [heretofore set out on page 79 of this transcript]), together with the said lands, were on the 26th day of February, 1876, sold at public auction to Jon-
103 athan K. Gapen without any reference to or reservation of the rights of the plaintiffs in and to the rents of said water-power at Delphi, and who afterwards, on the day of , sold, assigned, and conveyed that part of said canal and appurtenances thereto belonging lying between the city of Fort Wayne and the city of Lafayette to William Fleming who has since sold, assigned, and conveyed the said canal, with the water-power and privileges appurtenances thereto belonging, from the city of Logansport to the city of Lafayette, to said Elbert H. Shirk, H. J. Shirk, N. N. Dukes, of Peru, Indiana, and Thomas J. Immel, William Dolan, Jacob W. Dritt, and Charles B. Knowlton, of the city of Logansport, Ind.; that the said purchasers were placed in possession of the said canal and have been and now are using the same, and by virtue of the said purchase are claiming that they are entitled to receive the rents derived frpm the water-power, at the town of Delphi, created as hereinbefore stated; that the said Reed Case departed this life on the 23d day of October, 1871, leaving his widow and children, whose names are hereinbefore stated, him surviving; that letters of administration were in due form of law issued upon the said
104 estate, under which all debts thereof have been fully paid, and said estate has been settled and the said administrator discharged. The interest of the said decedent in the said sum of money so found to be due to him and the said James Spears was not included in the settlement of said estate, but descend*ent* to and rightfully belongs to his said widow and heirs aforesaid, and then the said James Spears and the representatives of the said Reed Case, deceased as aforesaid, have repeatedly demanded from the lessees of the said water-power at Delphi, as aforesaid, the payment of the rent thereof from the first day of Novem-

ber, 1875, to the present, which they have refused to pay, upon the ground that the said purchasers of the said canal claim to be entitled thereto; that there is now due from the said Enoch Rinehart, one of the said lessees, for the use of said water-power, from November, 1875, up to the 1st day of May, 1877, the sum of $796.50, and from the said Abner H. Bowen, one of the lessees as aforesaid, from the 1st day of November, 1875, up to the 1st day of May, 1877, the sum of $555.00; that Samuel B. Gookins was appointed receiver by this court, to act for and on behalf of the creditors of the said Wabash and Erie Canal, and
105 the board of trustees thereof, and now has in his possession the sum of , derived from the sale of the said canal and lands as aforesaid, a part of which resulted from the sale of the said water-power, at the town of Delphi as aforesaid; that the water-power created by the said works hereinbefore described was of sufficient capacity to propel thirty run of stones, but the persons in charge of the said canal only rented sufficient to propel the six run of stones as hereinbefore stated; that frequent applications were made to Thomas Dowling, the resident trustee, for further leases of the said water-power, all of which were refused, upon the alleged ground that the water was required at the city of Lafayette; that by reason of the said refusal the said contractors were prevented from receiving the sum found to be due to them, as shown by the certificate of the said Stearns Fisher, general superintendent of the said canal.

Wherefore and in consideration of the premises hereinbefore stated, the plaintiffs pray that the parties to the original action, the said Samuel B. Gookins as such receiver, and the said Elbert H. Shirk, H. J. Shirk, A. N. Dukes, Thomas J. Immel, William Dolan, Jacob W.
106 Dritt, and Charles B. Knowlton, as such purchasers and owners of the said canal, as aforesaid, and the said Enoch Rinehart and Abner H. Bowen as such lessees of said water power, as aforesaid, and each of them, be required to make full and complete answer to the matters and things hereinbefore alleged; that upon the final hearing of this cause the court will order, adjudge, and decree, that the sum which shall be found to be due to the plaintiffs shall be paid by the said Samuel B. Gookins as such receiver out of the funds now in his hands, or if the court shall be of opinion that the plaintiffs are not legally entitled to any relief hereinbefore prayed for, then they pray that it shall be ordered, adjudged, and decreed by the court that they be entitled to demand and receive from the said les'ees and their assigns all sums of money due from them for the rent of the water power, as aforesaid, or that may accrue from the 1st day of May, 1877; that a receiver be appointed to take charge of the said water power, manage and control the same, and collect the rents therefrom and apply the same to the payment of the claims of the plaintiffs until the same is fully paid, and that the said receiver shall be authorized and empowered to make
107 such additional leases of the said water power as can be safely done without interfering with the navigation of the said canal, but not to exceed thirty run of stone; that the said purchasers and owners of the said canal from the city of Logansport to the city of Lafayette, as aforesaid, be required to keep and maintain the dam, lock, and canal in good condition; to preserve and maintain said water power at the said city of Delphi, and that the said receiver be required to compel the les'ees of the said water power to keep and perform the stipulations contained in the leases aforesaid as to making of repairs of the

said canal, and for all other and further relief to which the plaintiffs are entitled by virtue of matters and things hereinbefore stated.

BUSKIRK & NICHOL,
*Solicitors for Plaintiffs.*

Bernard F. Schermerhorn, one of the plaintiffs in this action, for himself and on behalf of the other plaintiffs in this action, makes oath that the matters and things alleged in said bill of complaint are in all things true in substance and in fact, and that the plaintiffs are entitled to the relief herein prayed for.

B. F. SCHERMERHORN.

Subscribed and sworn to before me this 12 day of June, 1877.
J. D. HOWLAND, *Clerk.*

108 *Exhibit A to cross-bill of S. & C.*

This agreement, made this fifth day of July, 1852, between the board of trustees of the Wabash and Erie Canal, party of the first part, and James Spears, Reed Case, and James P. Dugan, party of the second part, witnesseth:

That said party of the first part, in consideration of the rents reserved and the covenants of the party of the second part hereinafter contained, and upon the express condition that the party of the second part shall continue during the whole of their term to comply with all and singular the limitations and conditions hereinafter contained, and shall in every respect perform all the stipulations of this agreement by said party to be performed, does hereby lease to said party of the second part, for the term of thirty years from and after the first day of November, 1852, subject to the restrictions, limitations, and conditions herein contained, the use and occupation of so much of the surplus water of the canal at Delphi not required for the purposes of navigation as, when economically applied on a Parker wheel placed at the proper level, to be
109 determined by the chief engineer, will give a water-power equivalent to three mill-stone powers, each supposed to grind and manufacture at the rate of five bushels of wheat per hour, corresponding with the standard mill-stone power heretofore fixed in other leases on the canal, and also for the purpose of using said water, the lot or parcel of ground belonging to said board of trustees, described as follows, to wit: Lots number eight (8), thirteen (13), and fourteen (14), in block No. 17; and also lot No. five (5), in block No. 18, of the ground belonging to said trustees lying west of the canal, at Delphi. The water herein leased to be applied to the purpose of manufacturing paper, and to be used on a Parker wheel of feet diameter, the water to be taken by a suitable head-race or trunk from the level or pool at the town of Delphi, of the Wabash and Erie Canal, and after passing over the wheel will be conducted by a suitable tail-race into the main tail-race leading to the river. The flow of water to the mill to be regulated and controlled
110 by a permanent regulating weir, to be constructed in the most substantial manner, with stone side and breast walls, agreeably to a plan to be furnished by the engineer; to be built in every respect according to his directions, so as not to endanger the safety of the canal or work connected therewith. The said head and tail race, with the weir, and the necessary trunk or forebay, to be constructed at the expense of the party of the second part.

And it is further expressly agreed between the parties that the engi-

neer, superintendent, lock-tender, or any other officer having charge of the canal, may at any and at all times, during the continuance of this lease, give such directions and take such measures as may from time to time be required to keep the water at the proper height for navigation in the canal, both above and below the mill, and may, if necessary for this purpose, at any time cause said mill or machinery to be stopped in whole or in part, and may regulate the height of the weir over which the water shall flow to said mill or wheel, as in his or their opinion
111 may be necessary, in order to keep the water in the canal at its proper height, and to prevent any more water from flowing to said wheel or wheels than is necessary to supply the canal below; and for this purpose said officer may raise or depress the height of said weir from time to time as may seem to him necessary.

And the party of the second part hereby agrees that they will not themselves, or by any agent or other person in their employment, at any time, change or alter said weir in any manner without being specially authorized so to do by the proper officers of the canal; and further, that they will not, without like authority, by themselves or by any agent or other person for their benefit, open or shut any lock-gate or paddle-gate, nor remove from or place upon any tumble or regulating weir, any plank or other fixture whatever. And the said party of the second part, for and in consideration of the aforesaid water privilege, and the right to use and occupy said water and ground, under the restrictions herein prescribed, agrees to pay to the said board of trustees a yearly
112 rent or sum of four hundred and fifty dollars ($450), one half of said yearly rent to come due and be paid on the first day of May, and the remaining half to be paid on the first day of November in each and every year, payable without any relief whatever from the valuation or appraisement laws, which shall be in full consideration for such water; and no deduction shall be made in consequence of a failure of a supply to propel said machinery, but the full amount of said sum is to be paid as hereinafter prescribed, notwithstanding any delays or stoppages which may occur by direction of the canal officers, as herein provided, or for want of water, or from freezing, or in consequence of floods, or of back-water, or from any other cause whatever. The rent to commence on and be computed from the first day of September, 1853, and to be paid semi annually thereafter, on the first days of May and November, as above required, in every year during the continuance of this lease, to the nearest collector of tolls on said canal.

And it is further understood that the party of the second part,
113 during the continuance of this lease, shall at their own expense keep constantly in good repair the race or trunk above described; and if any break or other injury shall at any time occur to the canal in consequence of the race or trunk not being faithfully constructed, or being suffered to be out of repair, or from any negligence of any person employed about the mills, then the said party of the second part shall forfeit and pay to the board of trustees the whole cost of repairing such breach or injury. And if the said party of the second part shall refuse or neglect to rebuild, repair, or strengthen the regulating wier, trunk, forebay, gate, or other work in the manner necessary to the security of the canal or the saving of water, after being notified in writing by the engineer, superintendent, or other proper agent of the board of trustees, that such renewal or repair is necessary for the safety of the canal, or to prevent the waste of water, then the board of trustees, by their proper agent, may enter upon the premises and make such repairs
114 at the expense of the party of the second part, and such refusal

or neglect shall also subject the party of the second part to a forfeiture of this contract or lease, at the option of said board; and any expenses which said board may incur in repairing the damage resulting to the canal in consequence of the neglect of said lessee, or in making repairs to the works of said lessee, necessary to guard against injury, or to prevent the waste of water, as above provided, shall be payable without any relief whatever from valuation or appraisement laws.

It is expressly understood and agreed by and between the parties that for the purpose of preventing or repairing breeches, removing obstructions to the navigation of the canal, or for the purpose of making any improvement in the canal or works connected therewith, any authorized agent of the board of trustees may cause the water to be drawn out of the canal and to remain out as long as may be necessary. And the party of the first part further reserves the right to resume at any
115 time the use of the water hereby leased, or any part thereof, whenever it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with the convenient navigation of said canal. And if it shall become necessary to resume so great a portion of the water hereby leased, or of the whole thereof, for so great a portion of the time as wholly to destroy the value of the privilege (which fact shall be determined by three judicious disinterested freeholders, to be appointed by the board of trustees), then the party of the second part shall be absolved from such time from all further liabilities growing out of this agreement, and shall also receive from the party of the first part the cash value of said mill-house and machinery necessary to run the mill, to be appraised by said three disinterested freeholders appointed as aforesaid.

It is further agreed that at the expiration of the term of this lease the board of trustees or their agent shall give public notice that proposals will be received for the water privilege hereby leased for a like term of years, which notice shall require that each proposal be accompanied by
116 an agreement on the part of the bidders to pay the party of the second part for all permanent and valuable buildings necessarily erected by said party of the second part for the use of the water (not including buildings for residence, mercantile purposes, or workshops), at such price as said buildings may be adjudged to be worth by three judicious disinterested freeholders, chosen as hereinbefore specified, provided such buildings shall be situated on lands belonging to the board of trustees; and said party of the second part shall thereupon be entitled to a renewal of this lease for a like term of thirty years, at such rent as may be offered by the highest responsible bidder. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, then the party of the second part shall be entitled to a renewal of the terms of this lease. And said board of trustees or their agent may extend or postpone the time of receiving proposals if they shall deem this necessary to guard the interests of the trust against fraudulent or unfair combinations.

It is further understood and agreed that the said party of the
117 second part shall not sell, assign, or transfer their right or interest derived from this agreement without consent in writing of some authorized agent of the board of trustees, nor until all arrearages of rent are paid, nor shall the water power hereby leased be applied to other purposes than that contemplated by this agreement without like authority. It is also agreed that the position of the mill shall be fixed by the engineer on this portion of the canal. The general form of the

water-wheel and the proportions of all other machinery shall be such as will be approved by said engineer.

And the said party of the second part, in order to secure the punctual payment of said rent as the same falls due by the terms of this lease, as also to secure the faithful observance of all the other covenants, stipulations and provisions herein provided to be done, performed, and observed by the party of the second part, and in order to give the said board an efficient remedy for the violation by the lessee of any part of the terms of this lease, doth hereby covenant and agree to and
118 with the said board of trustees as follows, to wit: That should any instalment of rent remain unpaid in whole or in part for the period of thirty days after the same falls due, said board may, by any of its agents, enter upon and take possession of the premises, ground, and water hereby leased, and of the buildings on the same, and resume all the rights and privileges hereby granted to said lessee, and consider and declare this lease forfeited to said board, without notice and without demand, the said party of the second part hereby waiving all demand of rent on the day the same falls due, or on any other day, either on the premises or elsewhere, and hereby waiving all notice on the part of said board of its intention to declare this lease forfeited, and hereby waiving all other formalities required by law to entitle the lessor to re-enter for or on account of the forfeiture, and hereby agreeing that said board by any of its agents may, without any formality, notice, or demand, and for the simple failure aforesaid, take possession of all and singular the said premises and the improvements thereon, and
119 relet the same to any other person or persons, without let or hinderance, and free from all claim of the party of the second part for damages by reason of said resumption and by reason of any money paid and improvements made under this lease.

And the said party of the second part further covenants and agrees that the failure of said board to enter upon said premises promptly upon or after such failure to pay the rent as aforesaid, shall not be deemed an acquiescence in such failure, or a waiver of the privilege of re-entry for such failure at any time.

And the party of the second part further covenants and agrees that the said board shall have and exercise the same remedy for failure on the part of the lessee to perform or observe any other stipulation, condition, or provision contained in this lease.

And it is further agreed between the parties that in case this lease shall be assigned, as herein provided for, and also in case of the death of the lessee or any assignee of this lease, the said board shall retain and exercise the same remedy above provided for the non-pay-
120 ment of rent, or the non-fulfilment of any other stipulation, condition, or provision in this lease, against any such assignee, and against the personal representatives, legatees, and devisees of the lessee and of any such assignee, it being the express agreement of the parties that the covenants herein and the remedies above provided shall run with the lease.

And it is further agreed between the parties that said board may, in addition to the above remedy, recover from said lessee and his assignee all damages sustained by reason of the failure of the lessee or assignee to deliver up said premises promptly on such forfeiture, and all costs, expenses, and attorney's fees necessarily paid or incurred in obtaining possession of said premises, the same to be collected without any relief whatever from the valuation or appraisement laws.

And it is further agreed that such forfeiture shall be deemed as

waived only on the happening of some one of the following events, to wit:

First. An endorsement by authority of said board on the lease waiving such forfeiture.

Second. By the acceptance of rent by the board after such forfeiture.

121 Third. Or by the taking of judgment by said board for the arrearages or rent.

In witness whereof the board of trustees of the Wabash and Erie Canal have caused their corporate seal to be hereto affixed; and the party of the second part, being the lessee above mentioned, have hereunto set their hands and seals on this fifteenth day of December, 1852.

N. B. The above interlineations and erasures made before signing, to wit: The 4th paragraph erased, and the word "September," in the 6th paragraph, written on an erasure.

THOS. DOWLING, *Res. Trustee.* [SEAL.]

Witness:

[SEAL.]

(Triplicate.)

[SEAL.]

The following modification of the foregoing lease is agreed to by the party of the first part, to wit: That a deduction from the rent shall be made for time during which said mill may be deprived of the use of the water by direction of the superintendent, in the same manner and

122 upon the same principle as is provided for and practiced in other leases on the Wabash & Erie Canal made by the State authorities prior to the year 1847.

In witness whereof the resident trustee has hereunto set his hand this tenth day of June, 1853.

[SEAL.]

THOS. DOWLING,
*Resident Trustee.*

123 To Spears & Case, Dr.

| | | | |
|---|---|---|---|
| | 1843. | | |
| Dec. | 1. | To am't of certificate | $10,354 20 |
| | | " 4 y'rs' 10 mo. int. to Oct. 1st, 1848 | 3,002 70 |
| | | | $13,356 90 |
| | 1848. | | |
| Oct. | 2. | By cash | 100 00 |
| | | Bal. due | $13,256 09 |
| | | To 6 mo. & 15 d. int. to Ap'l 17, '49 | 430 85 |
| | | | $13,687 75 |
| | 1849. | | |
| April | 17. | By cash | 100 00 |
| | | Bal. due | $13,587 75 |
| | | To 7 mo. & 2 d'ys' int. to Nov. 19, '49 | 480 10 |
| | | | $14,067 85 |
| Nov. | 19. | By cash | 40 46 |

| | | | |
|---|---|---|---|
| | | Bal. due | $14,027 39 |
| | | To 16 d'ys' ints. to Dec. 6, '49 | 37 40 |
| | | | $14,064 79 |
| Dec. | 6. | By cash | 100 00 |
| " | " | Bal. due | $13,964 79 |
| | | To 2 mo. 15 d'ys' int. to Feb. 19, '50 | 174 55 |
| | | | $14,139 34 |
| | 1850. | | |
| Feb. | 19. | By cash | 275 00 |
| | | Bal. due | $13,864 34 |
| | | To 3 mo. 9 d'y' int. to May 28, '50 | 228 76 |
| | | | $14,093 10 |
| May | 28. | By cash | 180 29 |
| | | F'w'd, bal. due | 13,912 81 |
| 124 | 1850. | | |
| May | 28. | A'mt forw'd, bal. due | $13,912 81 |
| | | To 2 y'rs 6 mo. & 2 d'ys' int. to Nov. 30, '52. | 2,091 61 |
| | | | $16,004 42 |
| | 1852. | | |
| Nov. | 30. | By cash | 940 50 |
| | " | Bal. due | $15,063 92 |
| | | To 11 mo. 26 d'ys' int. to Nov. 26, '53 | 893 80 |
| | | | $15,957 72 |
| | 1853. | | |
| Nov. | 26. | By cash | 225 00 |
| | | Bal. due | $15,732 72 |
| | | To 5 mo. 4 d'ys' int. to May 1st, '54 | 403 79 |
| | | | $16,136 51 |
| | 1854. | | |
| May | 1. | By cash | 168 75 |
| | | Bal. due | $15,967 76 |
| | | To 60 d'ys' int. to June 30, '54 | 159 68 |
| | | | $16,127 44 |
| June | 30. | By cash | 225 00 |
| | " | Bal. due | $15,902 44 |
| | | To 4 mo. int. to Nov. 1st, '54 | 318 04 |
| | | | $16,229 48 |
| Nov. | 1. | By cash | 225 00 |

| | | | |
|---|---|---|---|
| | | Bal. due | $15,995 48 |
| | | To 37 d'ys' int. to Dec. 8, '54 | 98 64 |
| | | | $16,094 12 |
| Dec. | 8. | By cash | 225 00 |
| | | Bal. due | $15,869 12 |
| | | To 4 mo. 22 d'ys' int. to May 1, '55 | 375 57 |
| | | | $16,244 69 |
| | 1855. | | |
| May | 1. | By cash | 225 00 |
| | | Bal. due | $16,019 69 |
| | | To 25 d'ys' int. to May 25, '55 | 66 75 |
| | 125 | | $16,086 44 |
| May | 25. | By cash | 225 00 |
| | | Bal. due | $15,861 44 |
| | | To 5 mo. 18 d'ys' int. to Nov. 12, '55 | 444 11 |
| | | | $16,305 55 |
| Nov. | 12. | By cash | 225 00 |
| | | Bal. due | $16,080 55 |
| | | To 12 d'ys' int. to Nov. 24, '55 | 32 16 |
| | | | $16,112 71 |
| " | 24. | By cash | 225 00 |
| | " | Bal. due | $15,887 71 |
| | | To 5 mo. 28 d'ys' int. to May 22, '56 | 471 32 |
| | | | $16,359 03 |
| | 1856. | | |
| May | 22. | By cash | 225 00 |
| | | Bal. due | $16,134 03 |
| | | To 2 mo. 13 d'ys' int. to Aug. 4, '56 | 196 30 |
| | | | $16,330 33 |
| Aug. | 4. | By cash | 350 00 |
| | | Bal. due | $15,980 33 |
| | | To 3 mo. 16 d'ys' int. to Nov. 20, '56 | 282 31 |
| | | | $16,262 64 |
| Nov. 20 & 22. | | By cash | 550 00 |
| | | Bal. due | $15,712 64 |
| | | To 5 mo. 8 d'ys' int. to May 1st, '57 | 413 75 |
| | | | $16,126 39 |

| | | | |
|---|---|---|---|
| | 1857. | | |
| May | 1. By cash | | 225 00 |
| | " Bal. due | | $15,901 39 |
| | To 25 d'ys' int. to May 25, '57 | | 66 25 |
| | | | 15,967 64 |
| " | 25. By cash | | 225 00 |
| 126 | Bal. due | | $15,742 64 |
| | To 5 mo. 6 d'ys' int. to Nov. 1st, '57 | | 409 29 |
| | | | $16,151 93 |
| Nov. | 1. By cash | | 225 00 |
| | Bal. due | | $15,926 93 |
| | To 30 d'ys' int. to Dec. 1st, '57 | | 79 64 |
| | | | $16,006 57 |
| Dec. | 1. By cash | | 225 00 |
| | Bal. due | | $15,781 57 |
| | To 44 d'ys' int. to Jan. 14, '58 | | 115 73 |
| | | | $15,897 30 |
| | 1858. | | |
| Jan. | 14. By cash | | 225 00 |
| | Bal. due | | $15,672 30 |
| | To 4 mo. 2 d'ys' int. to May 17, '58 | | 318 66 |
| | | | $15,990 96 |
| May | 17. By cash | | 225 00 |
| | Bal. due | | $15,765 96 |
| | To 9 d'ys' int. to May 26, '58 | | 23 64 |
| | | | $15,789 60 |
| " | 26. By cash | | 225 00 |
| | Bal. due | | $15,564 60 |
| | To 6 mo. 5 d'ys' int. to Dec. 2, '58 | | 479 89 |
| | | | $16,044 49 |
| Dec. | 2. By cash | | 225 00 |
| | Bal. due | | 15,819 49 |
| | To 5 mo. 17 d'ys' int. to May 20, '59 | | 440 30 |
| | | | 16,259 79 |
| | 1859. | | |
| May | 20. By cash | | 225 00 |
| | Bal. due | | 16,034 79 |
| | To 6 mo. 8 d'ys' int. to Nov. 29, '59 | | 502 40 |

| | | | |
|---|---|---|---|
| 127 | | | 16,537 19 |
| | 1859. | | |
| | Nov. 29. | By cash | 225 00 |
| | " | Bal. due | 16,312 19 |
| | | To 4 mo. 21 d'ys' int. to Ap'l 20, '60 | 383 33 |
| | | | 16,695 52 |
| | 1860. | | |
| | April 20. | By cash | 225 00 |
| | " | Bal. due | 16,470 52 |
| | | To 6 mo. 13 d'ys' int. to Nov. 3, '60 | 529 79 |
| | | | 17,000 31 |
| | Nov. 3. | By cash | 450 00 |
| | " | Bal. due | 16,550 31 |
| | | To 8 d'ys' int. to Nov. 10, 13, 1860 | 22 06 |
| | | | 16,572 37 |
| | 10,13. | By cash | 450 00 |
| | " | Bal. due | 16,122 37 |
| | | To 63 d'ys' int. to Jan'y 16, '61 | 169 28 |
| | | | 16,291 65 |
| | 1861. | | |
| | Jan'y 16. | By cash | 225 00 |
| | " | Bal. due | 16,066 65 |
| | | To 3 mo. 14 d'ys' int. to May 1st, '61 | 278 47 |
| | | | 16,345 12 |
| | May 1. | By cash | 225 00 |
| | | Bal. due | 16,120 12 |
| | | To 3 mo. 21 d'ys' int. to Aug. 22, '61 | 298 00 |
| | | | 16,418 12 |
| | Aug. 22. | By cash | 225 00 |
| | | Bal. due | 16,193 12 |
| | | To 59 d'ys' int. to Oct. 21, '61 | 159 23 |
| | | | 16,352 35 |
| | Oct. 21. | By cash | 225 00 |
| | | Bal. due | 16,127 35 |
| 128 | | Bal. due | 16,127 35 |
| | | To one year's int. Oct. 23, '62 | 967 62 |
| | | | 17,094 97 |

| | | | |
|---|---|---|---|
| | 1862. | | |
| Oct. | 23. | By cash | 450 00 |
| | " | Bal. due | 16,644 97 |
| | | To 2 mo. 15 d'ys' int. to Jan'y 8, '63 | 208 06 |
| | | | 16,853 03 |
| | 1863. | | |
| Jan. | 8. | By cash | 450 00 |
| | " | Bal. due | 16,403 03 |
| | | To 10 mo. 23 d'ys' int. to Dec. 3, '63 | 883 02 |
| | | | 17,286 05 |
| Dec. | 3,4. | By cash | 900 00 |
| | " | Bal. due | 16,386 05 |
| | | To 1 yr. 4 mo. 28 d'ys' int. to May 2, '65 | 1,387 35 |
| | | | 17,773 40 |
| | 1865. | | |
| May | 2. | By cash | 225 00 |
| | " | Bal. due | 17,548 40 |
| | | To 6 mo. 3 d'ys' int. to Nov. 6, '65 | 535 21 |
| | | | 18,083 61 |
| Nov. | 6. | By cash | 225 00 |
| | " | Bal. due | 17,858 61 |
| | | To 2 y'rs 5 mo. 24 d'ys' int. to May 1, '68 | 2,660 84 |
| | | | 20,519 45 |
| | 1868. | | |
| May | 1. | By cash | 525 00 |
| | " | Bal. due | 19,994 45 |
| | | To 6 mo. 24 d'ys' int. to Nov. 25, '68 | 679 80 |
| | | | 20,674 25 |
| Nov. | 25. | By cash | 693 75 |
| | " | Bal. due | 19,980 50 |
| | | To 12 d'ys' int. to Dec. 8, '68 | 38 12 |
| | | | 20,018 62 |
| 129 Dec. | 8. | By cash | 675 00 |
| | " | Bal. due | 19,343 62 |
| | | To one yr. 3 mo. 20 d'ys' int. to Mch. 30, '70 | 1,515 19 |
| | | | 20,858 81 |
| | 1870. | | |
| March | 30. | By cash | 225 00 |

| | | | |
|---|---|---|---|
| | " Bal. due | | 20,663 81 |
| | To 2 mo. 20 d'ys' int. to June 20, '70 | | 275 11 |
| | | | 20,908 92 |
| June | 20. By cash | | 225 00 |
| | " Bal. due | | 20,683 92 |
| | To 8 mo. 24 d'ys' int. to Mc'h 17, '71. | | 910 10 |
| | | | 21,594 02 |
| | 1871. | | |
| M'c'h | 17. By cash | | 225 00 |
| | " Bal. due | | 21,369 02 |
| | To 7 mo. int. to Oct. 17, '71 | | 747 92 |
| | | | 22,116 94 |
| Oct. | 17. By cash | | 450 00 |
| | " Bal. due | | 21,666 94 |
| | To 3 mo. 15 d'ys' int. to Feb. 2, '72 | | 379 15 |
| | | | 22,046 09 |
| | 1872. | | |
| Feb. | 2. By cash | | 675 00 |
| | " Bal. due | | 21,371 09 |
| | To 6 mo. 18 d'ys' int. to Aug. 20, '72 | | 705 24 |
| | | | 22,076 43 |
| Aug. | 20. By cash | | 225 00 |
| | " Bal. due | | 21,851 43 |
| | To 25 d'ys' int. to Sept. 14, '72 | | 91 05 |
| | | | 21,942 48 |
| Sept. | 14. By cash | | 225 00 |
| | " Bal. due | | 21,717 48 |
| 130 | To 1 mo. 20 d'ys' int. to Nov. 4, '72 | | 180 97 |
| | | | $21,898 45 |
| Nov. | 4. By cash | | 225 00 |
| | " Bal. due | | $21,673 45 |
| | To 5 d'ys' int. to Nov. 9, '72 | | 17 95 |
| | | | $21,691 40 |
| Nov. | 9. By cash | | 225 00 |
| | " Bal. due | | $21,466 40 |
| | To 3 mo. 3 d'ys' int. to Feb. 12, '73 | | 332 72 |
| | | | $21,809 12 |

| | | | |
|---|---|---|---|
| 1873. | | | |
| Feb. | 12. | By cash | 225 00 |
| | " | Bal. due | $21,584 12 |
| | | To 3 mo. 14 d'ys' int. to M'ch 26, '73 | 374 08 |
| | | | $21,958 20 |
| May | 26. | By cash | 225 00 |
| | " | Bal. due | $21,733 20 |
| | | To 5 mo. 5 d'ys' int. to Nov. 1st, '73 | 561 43 |
| | | | $22,293 63 |
| 1873. | | | |
| Nov. | 1. | By cash | 225 00 |
| | " | Bal. due | $22,068 63 |
| | | To 5 mo. 29 d'ys' int. to May 1st & Ap'l 29, '74. | 658 05 |
| | | | $22,726 68 |
| 1874. | | | |
| Ap'l 29—May | 1st. | By cash | 450 00 |
| | " | Bal. due | $22,276 68 |
| | | To 14 d'ys' int. to May 15, '74 | 51 97 |
| | | | $22,328 65 |
| May | 15. | By cash | 225 00 |
| | " | Bal. due | $22,103 65 |
| | | To 4 mo. 20 d'ys' int. to Nov. 5, '74 | 515 72 |
| | | | $22,619 37 |
| 131 Nov. | 5. | By cash | 225 00 |
| | " | Bal. due | $22,394 37 |
| | | To 5 mo. 24 d'ys' int. to Ap'l 29, '75 | 649 43 |
| | | | $23,043 80 |
| 1875. | | | |
| Ap'l | 29. | By cash | 225 00 |
| | " | Bal. due | $22,818 80 |
| | | To 6 mo. 2 d'ys' int. to Nov. 1, '75 | 792 17 |
| | | | $23,610 97 |
| Nov. | 1. | By cash | 1,123 50 |
| | " | Bal. due | $22,486 47 |
| | | To 1 y'r 7 mo. 15 d'ys' int. to June 15, '77 | 2,292 39 |
| June 15, 1877. | | Am't due | $24,678 86 |

Copy.

DELPHI, *Sept.* 29, 1847.

I hereby certify that Spears & Case have performed work to the value

of ten thousand three hundred & fifty-four $\frac{20}{100}$ dollars in cleaning out "the bayou which extends from the canal at Delphi to the Wabash River," estimating according to the terms of a contract between said Spears & Case and S. Fisher, com's of the W. & E. Canal, dated May 1st, 1842, made in pursuance of an act entitled "An act relative to water power at the town of Delphi, in Carrall County, approved Jan. 20, 1842."

And that according to the provisions of an act entitled "An act
132 authorizing a settlement with Spears & Case for work done on the side cut at Delphi, in Carroll County, approved Jan. 19, 1846," the said Spears and Case are entitled to receive interest on said sum until paid. And I certify also that said work was performed prior to the first day December, 1843.

$10,354.20.

S. FISHER,
*Gen'l Sup't W. & E. Canal.*

133 And thereupon subpœnas in chancery are ordered issued:

*Subpœna.*

UNITED STATES OF AMERICA,
*District of Indiana:*

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded to summon Jonathan K. Gapen, the board of trustees of the Wabash and Erie Canal, Samuel B. Gookins, receiver, Elbert H. Shirk, H. J. Shirk, A. N. Dukes (Peru), Thomas J. Immell, William Dulan, Jacob W. Dritt, Charles B. Knowlton, Enoch Rinehart, and Abner H. Bowen, citizens of and residents in the State of Indiana, if they be found in your district, to be and appear in the circuit court of the United States for the district of Indiana aforesaid, at Indianapolis, on the first Monday in August next, to answer a certain cross-bill in chancery, filed and exhibited in said court against them by James Spears, John S. Case, James S. Case, Reed Case, Charles G. Case, Josephine C. Schemerhorn, Bernard F. Schemerhorn, and Huldah E. Case, citizens of and residents in the State of Indiana.

Hereof they are not to fail, under the penalty of the law thence ensuing, and have you then and there this writ.

Witness honorable Morrison R. Waite, Chief Justice of the
134 United States, this 7th day of July, A. D. 1877, and in the one hundred and second year of the Independence of the United States of America.

Attest:
[SEAL.]

J. D. HOWLAND,
*Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of August, 1877; otherwise the said cross-bill may be taken pro confesso.

J. D. HOWLAND,
*Clerk.*

(Endorsed on the back as follows:)

We each and severally acknowledge service of this summons.

JACOB W. DRITT.
C. B. KNOWLTON.
WILLIAM DOLAN.
T. J. IMMEL.

We acknowledge service of the within writ on us the 10th day of July, 1877.

ELBERT H. SHIRK.
A. N. DUKES.
HARVEY J. SHIRK.

DELPHI.

I received this writ at Indianapolis, in said district, at 3 o'clock p. m. on the tenth day of July, A. D. 1877, and served the same in
135 Carroll County, as follows: 10th day of July, 1877, by reading and delivering a true copy of this writ to Enoch Rinehart and Abner H. Bowen. The others not found in Carroll County whereon to serve this writ.

BEN. J. SPONIER,
*U. S. Marshal,*
By ED. H. GRESHAM,
*Sheriff C. C.*

And afterwards, to wit, at the May term of said court, on this 30th day of October, 1877, before the Hon. Walter Q. Gresham, on' of the judges of said court, the following further proceedings in the above entitled cause were had, to wit:

Comes now the receiver by counsel and files his demurrer to the cross-bill of James Spears et al. in the words following, to wit:

*Demurrer.*

This defendant, not admitting any of the matters and things in the said cross-bill set forth and stated to be true as therein alleged, says the said complainants in their said cross-bill have not set forth and stated any such case as will entitle the complainants to any relief in a court of equity as against this defendant; wherefore this defendant doth
136 demur thereto in law, and he prays the judgment of this honorable court whether the complainants have set forth and stated in this said cross-bill any such case as will entitle them to any further answer herein, and that the said cross-bill as to him be dismissed with costs.

S. B. GOOKINS, *Receiver.*

Samuel B. Gookins, of counsel herein, certifies that in his opinion the foregoing demurrer is well founded in point of law.

S. B. GOOKINS, *Of Counsel.*

STATE OF INDIANA,
*Vigo County, ss:*

Samuel B. Gookins, being duly sworn, says the foregoing demurrer is not interposed for delay.

S. B. GOOKINS.

Subscribed and sworn to before me, a notary public of said county, this 29th day of October, 1877.

[SEAL.]

G. C. JOAB,
*Notary Public.*

And afterwards, to wit, at the November term of said court, on the 27th day of February, 1878, before the Hon. Thomas Drummond and Walter Q. Gresham, judges of said court, the following further proceedings in the above entitled cause were had, to wit:

137 Comes now Albert H. Shirk, by Mess. Taylor and Morris, his solicitors, and files his demurrer herein to the bill of James Spears, heretofore filed, in the words and following, to wit:

*Demurrer.*

The demurrer of Elbert H. Shirk, H. J. Shirk, A. N. Dukes, Thomas J. Immel, William Dolan, Jacob M. Dritt, & Charles B. Knowlton, to the intervening bill of complaint of James Spears, John S. Case, James S. Case, Reed Case, Charles G. Case, Josephine C. Schemerhorn, Bernard F. Schemerhorn & Huldah E. Case, the above named plaintiffs.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true, doth demur to the said bill, and for cause of demurrer showeth:

1. That this court hath not jurisdiction of the subject-matter of said bill, or of the persons of these defendants, or any of them.

2. That the said bill doth not contain any matter of equity whereon this court can ground any decree or give the plaintiffs any relief against these defendants or any or either of them.

138 Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants doth demur thereto and humbly demand the judgments of this court whether he should be compelled to make any further or other answer to the said bill, and prayed to be hence dismissed with his costs.

TAYLOR & MORRIS,
*Sol's for Def'ts.*

Robert S. Taylor, of counsel for said defendants in the above demurrer named, hereby certifies that in his opinion the foregoing demurrer is well founded in law, and states further that the same is not interposed for delay.

ROBERT S. TAYLOR,
*Of Counsel for Def'ts.*

139 *Demr. of board of trustees, &c.*

The defendant, the board of trustees of the Wabash and Erie Canal, by protestation, not confessing all or of the matters and things in the plaintiff's bill of complaint contained to be true, doth demur to the said bill, and for cause of demurrer, showeth:

1st. That this court hath not jurisdiction of the subject matter of said bill, or of the person of this defendant.

2nd. That the said bill doth not contain any matter of equity whereon this court can ground any decree or give the plaintiffs any relief against the defendant.

Wherefore, and for divers other reasons and good causes of demurrer appearing in said bill, the defendant doth demur thereto and humbly demand the judgment of this court whether he should be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with his costs.

BOARD OF TRUSTEES OF WABASH AND ERIE CANAL,
By McDONALD & BUTLER, *Atty's.*

McDonald & Butler, counsel for said defendant, the board of
140 trustees of the Wabash and Erie Canal, in the above demurrer named, hereby certifies that in their opinion the foregoing demurrer is well founded in law, and states further that the same is not interposed for delay.

McDONALD & BUTLER.
*Atty's for Board of Trustees of Wabash & Erie Canal.*

*The demurrer of Jonathan K. Gapen, complainant.*

The complainant, Jonathan K. Gapen, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true, doth demur to the said bill, and for cause of demurrer showeth:

1st. That this court hath not jurisdiction of the subject-matter of said bill, or of the person of this complainant.

2nd. That the said bill doth not contain any matter of equity, whereon this court can ground any decree, or give the plaintiff any relief against the complainant.

Wherefore, and for divers other good causes of demurrer ap-
141 pearing in said bill, the complainant doth demur thereto, and humbly demand the judgment of this court, whether he should be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with his costs.

CLAYPOOL, NEWCOMB & KETCHAM,
*Solicitors for s'd Complainant.*

Claypool, Newcomb and Ketcham, counsel for said complainant, in the above demurrer named, hereby certifies that in their opinion the foregoing demurrer is well founded in law, and states further that the same is not interposed for delay.

CLAYPOOL, NEWCOMB & KETCHAM,
*Solicitors for Compl.*

And afterwards, to wit, at the May term of said court, on the 20th day of June, 1878, before the Hon. Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come again the parties, by their solicitors aforesaid, and the board of trustees of the Wabash and Erie Canal, by their solicitors, McDonald and Butler, and now file its separate demurrer to the intervening complaint of Spears, Case, et al., and the court having duly considered said demurrer and the other demurrers heretofore filed to said inter-
142 vening bill, does now find and determine that the said intervening bill contains no matter against either or any of the defendants in said intervening bill and each of the several demurrers to the said intervening bill are by the courts sustained for the want of equity and for other causes contained and appearing in said bill; to which ruling and decision of the court the complainants in said intervening bill, except: It is, therefore, ordered by the court that the said intervening bill be, and the same is, hereby dismissed at the costs of the complainants therein. To which ruling and decision of the court in dismissing the said intervening bill the complainants therein except.

The complainants in said intervening bill pray an appeal to the Supreme Court of the United States from the decision and order of the

court, sustaining the respective demurrers hereinbefore set out to the said intervening bill, and dismissing the same; which appeal is granted and allowed by this court, and the said Spears, Case & the other complainants are directed to file their bond in the penalty of $1,000.00 with surety to the approval of the court, and conditioned for the due prosecution of said appeal, and for the payment of all costs assessed
143 against them on said appeal. And now the said complainants, Spears, Case, et al., in the said bill mentioned tender said bond with James P. Dougan as surety; which bond and surety are approved by the court, and the said bond is ordered to be filed, which is now done.

And now on motion of the complainants in said intervening bill it is ordered that S. B. Gookins, receiver herein, reserve & withhold from the money & assets in his hand for distribution the further sum of $15,000 in addition to the $20,000 hereinbefore ordered to be reserved, and about $9,000 the amount of the claim of Fleming now herein pending, said sums to be reserved until the determination of the claims mentioned above, or until some further order of this court, and in the mean time that they be paid into the registry of this court.

144 And afterwards, to wit, at the November term of said court, on the 13th day of April, 1878, before the Hon. Walter Q Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now Morgan, French, et al., and by leave of court file
145 their petition herein in the words following, to wit:
This petition amended and refiled May 15th, 1878, and set out below.

And afterwards, to wit, at the May term of said court, on the 15th day of May, 1878, before the Hon. Walter Q. Gresham, one of the judges of said court; the following further proceedings in the above-entitled cause were had, to wit:

Come now R. Mordan French et al., by counsel, and file their amended petition herein in words following, to wit:

*Petition.*

146 Your petitioners, R. Morgan French, Oliver W. Jefferds, and Charles Hanna, parties doing business under the style of French, Hanna & Co., and Warren H. Withers, trustee for said Charles Hanna, respectfully show to your honors that prior to the year 1843 one Henry Johns, of Fort Wayne, in said district, was the owner of a valuable mill privilege and water-power, originally sold by the government as a mill *sight*, and as such purchased by the said Johns on the St. Joseph River, just north of Fort Wayne, Allen County, Indiana; that for the purpose of procuring the water necessary to supply the summit level of the Wabash and Erie Canal, it became necessary to draw largely from the waters of said river above said water-power and mill privilege of said Johns, and for this purpose in the construction of said canal
147 a dam was constructed in said river above said mill and water-power, and a feeder extending thence and connecting with the main line of said canal at Fort Wayne.

That by reason of the construction of said dam and feeder, and the deflection of the water through the same at low stages of water in said river, the volume of water flowing to the mill of said Johns was so re-

duced as to be practically useless, and as a consequence during a large part of the year said Johns' water-power and mill privilege were destroyed.

That by reason of the premises, said Johns had a large claim against the State of Indiana for damages so sustained by him, and such damages had been awarded to said Johns, and in view of such injustice so done to him and said claims and awards, and with a view to adjust and settle said claims and compensate him for all said damages, the legislature of Indiana passed an act, which was approved on the 11th day of February, 1843, in the words and figures following, to wit:

148 AN ACT for the relief of Henry Johns.

Whereas Henry Johns, of the county of Allen, previous to the commencement of the Wabash and Erie Canal, was the owner of a valuable mill privilege or water-power on the St. Joseph River, and had erected a valuable mill thereon; and whereas the State of Indiana did afterwards erect a feeder dam to supply with water the summit level of the Wabash and Erie Canal above the mills erected by said Johns on the St. Joseph River, thereby abstracting from the mills aforesaid about five thousand cubic feet of water per minute, which in low stages of water is all the water contained in said river St. Joseph, and renders wholly useless the mills erected by said Johns; therefore,

SEC. 1. Be it enacted by the general assembly of the State of Indiana, that the commissioner of the Wabash and Erie Canal be, and is hereby, directed to cause to be supplied to said Henry Johns, his heirs and assigns forever, from the Wabash and Erie Canal, at the town of Fort Wayne, in the county of Allen, on land now owned or to be purchased by said Johns, a sufficient quantity of water to propel three pair
149 of burr mill stones free of any toll or water rent, and continue to supply the same to the use of the said Johns, his heirs and assigns forever, at all times when the same shall not be needed to fill the contracts heretofore made with Samuel Edsall and Hamilton and Williams, as required for the purpose of navigating said canal, provided that the said Johns shall for himself, his heirs and assigns, release to the State of Indiana all claims against the State for the abstraction of water from the St. Joseph River to supply the Wabash and Erie Canal, and shall also credit in full any or all awards or judgments that shall have been recovered by said Johns against the State for the abstraction of any water-power.

SEC. 2. This act to take effect and be in force from and after its passage.

THOS. D. HURLEY,
*Speaker of the House of Rep's.*
THOMAS D. WALPOLE,
*President pro tem. of the Senate.*

Approved Feb'y 11th, 1843.

SAM. BIGGES.

Your petitioners further show that in pursuance of said legislative act, and for the purpose of carrying the same into effect, the State
150 of Indiana, through its agent, Stearns Fisher, commissioner of the said Wabash and Erie Canal, on the 6th day of July, 1843, entered into a contract of cash with the said Henry Johns, whereby, in consideration of the release by said Henry Johns, of all claims against the State on account of the abstraction of said water and the injury to said

water power, said State of Indiana did lease to said Henry Johns, his heirs and assigns forever, the use and occupation of so much of the surplus water (not required for purposes of navigation or to fill the contracts heretofore made with Edsall and Hamilton & Williams), at the town of Fort Wayne, to be and on lot number nine (9) of the county addition to said town, as will be sufficient, when properly applied, on an overshot wheel of sixteen feet diameter, with the proper gearing, to propel three run of four and one-half feet mill-stones, grinding at the rate of five bushels per hour each, to be applied to such manufacturing purposes as the said second party may choose; as will more fully appear by a copy of said lease hereto attached and made a part hereof, marked "A"; that said lease was duly recorded in the recorder's office of Allen County, Indiana,
151 January 2, 1857, and all assignments thereof have been duly recorded at the same place from time to time as the same have been made; and your petitioners aver that by the passage of said act of the legislature and the execution of said lease and by accepting and taking from said Johns then and there his said mill privilege and water power on the river for all time, the said State became bound in morals and in law to continue unto said Johns for all time the use of said water power so granted on said canal according to the terms of said grant and said lease.

Your petitioners further show that afterwards, on the 19th day of January, 1846, the legislature of Indiana, by an act known in the history of the legislation of the State as the "Butler bill," transferred said Wabash & Erie Canal, with all its property of every nature and description, to certain trustees, for the purposes and on the trusts in said act named, but "subject nevertheless to all existing rights and equities against the State on account of the same or any part thereof, or liabilities of the State growing out of or in relation thereto."
152 That thereby said trustees took said property, charged with all the equities in favor of the said Johns, his heirs and assigns, and became bound to furnish to him and his heirs and assigns the water power, in accordance with said contract, grant and lease, which was duly recorded in the recorder's office of Allen County, Indiana, as provided by law for the recording of leases and other instruments of that character.

Your petitioners further show that at the death of said Henry Johns, all his right and interest in and to said grant and lease descended to his only heir at law, Elizabeth Rudesell; and that, through sundry mean' conveyances the same has been transferred to and become the property of your petitioners.

That the trustees authorized by the said act of the legislature, known as the Butler bill, and the amendments thereto, and in pursuance of the subsequent legislation on the subject, all of which legislation more fully appears in the exhibits filed with the original bill and answers in this suit, took possession of and continued to use said canal, with all
153 its branches, including said feeder, until superseded in the management of the same by the receiver appointed in this suit.

That on the 24 day of December, 1875, this court ordered, adjudged, and decreed that said canal, with all its appurtenances and appendages thereto belonging, together with all the lands transferred by the State to the said trustees remaining unsold, as well as all the main line of said canal including its banks, margins, tow-paths, side cuts, feeders, basins, rights of way, locks, dams, water powers, and all its property of every nature and description, should be sold at public auction in a body or in sections.

That, in pursuance of said order, a master in chancery was appointed

by the court who did sell said property to various parties; that all of said canal was sold by said master to said complainant, Gapen, and his bid for all that part of said canal and all its property lying between the city of Lafayette and the Ohio State line was sold & assigned by said Jonathan K. Gapen to one William Fleming; that said Fleming
154 has since sold a portion (undivided) of the interest in said property so acquired by him to John H. Bass, Oscar A. Sumons, James Lillie, George J. Bippus & Robert Simonton; that in said sale so ordered by this court no reservation was made of the rights of these petitioners in said water power, but, so far as the terms of said sale were concerned, it embraced all and singular the property of said canal either principal or appurtenant, of every nature and description; that said sale has been confirmed by the court; that the said Fleming and his associates who have purchased from him and now in the possession of said entire canal property in Allen County, and insist that as such purchasers they are under no obligations to supply your petitioners with the surplus water as provided in said lease, and have refused and failed so to supply them with said surplus water, and are denying that your petitioners have any rights in said water power or any claim longer to enjoy the same, or in any manner to use the same; but have served on your petitioners a notice that if they longer continue to use the same, as they and their grantors have used the same ever since said
155 grant in 1843, they, said Fleming and his associates, will require from them a payment of a rental amounting to $1,500 per year.

Your petitioners further show that, in expectation of the permanent enjoyment of said water power, they have erected large and extensive woolen mills on said lot nine (9) in Fort Wayne, at a cost of $25,000.00 *dollars*, and for many years have been operating the same by means of said water power on said canal so granted to said Johns & thence conveyed to them; that the part of said canal in Allen County including that supplying said water power is still kept up by said purchasers. That said water power is of great value to your petitioners, as was the grant made by said Johns on the river for the same; that the annual value of said water power is at least $1,500.00 and the aggregate value of the same is not less than $25,000.00 and in the sale of said canal the water power so granted to said Johns and now owned by petitioners added at least $20,000 to the price paid and to the fund now in
156 court. Your petitioner' further show that by said sale so made of said canal property, of every nature and description, a large fund, to wit, $150,000 has been realized, and is now in the custody of this court, and that of said fund, at least $50,000 has been derived from the sale of that part of said canal which is supplied with water only by the feeder constructed to divert the water, and from the water, in fact, diverted from the St. Joseph River above the mill of said Johns, as aforesaid, and which was so ceded by said Johns to the State, as aforesaid, and that of said $50,000 so realized, at least four-fifths was derived from the sale of the water powers on said canal made by the water so diverted from the mill of said Johns and ceded to the State, as aforesaid, as the condition for the grant of said perpetual water power to him; that said purchasers contend that said property was sold to them absolutely free and clear of all claims of your petitioners; while it is on the other hand pretended by the receiver and said trustees that your petitioners have no claim whatever on said funds whe reas your petitioners insist that, as they had a claim in the nature of a personal
157 liability against said State, that the same was assumed by said trustees, and that their said claim was and is a charge not only

on said fund but that it also follows said property into whosesoever hands it passes.

But insomuch as there is great danger that, from the abandonment of said canal as a public highway, it may go to ruin, and your petitioners' claim upon the property itself became of little value, and by reason of your petitioner's manifest equity in the premises, and forasmuch as this large fund, so derrived from the sale of said property, is now in the custody of this court for distribution to all parties equitably interested therein, and forasmuch as all the parties, as well the purchasers as the original complainants and defendants herein, are still before the court for the settlement of all equities in the premises;

Your petitioners pray that they have leave to file this their intervening petition; that said parties to this original suit, the said Samuel B. Gookins, as such receiver, and the said William Fleming, John H. Bass,
Oscar A. Simons, James Lillie, George J. Bippus, and Robert
158 Simonton, as such purchasers, and each of them, be required to make full, and answer in the premises, and show, if they can, why your petitioners should not be paid out of said fund any damages which they may sustain by reason of the abandonment of said canal by the State and by said trustees, and why the estate of said purchasers in said property shall not be declared to be servient to that of your petitioners, and upon the hearing will your honors grant to your petitioners all such relief as may be just, equitable, and proper.

HARRISON, HINES & MILLER, &
MORRIS & WITHERS,
*Pet'rs Sol's.*

STATE OF INDIANA,
*Allen County, ss:*

Personally appeared before me, the undersigned, a notary public, in and for said county, R. Morgan French, who, being by me duly sworn, in his said oaths, says that he has carefully read the foregoing petition, and the facts therein stated are true, and that he believes the annual and aggregate value of the water power described in said petition to be as therein stated.

R. MORGAN FRENCH.

Subscribed and sworn to before me this 5 day of April, 1878.
[SEAL.] JOHN F. RODABAUGH,
*Notary Public.*

159 *Exhibit to petition of R. Morgan French et al.*

This agreement, made this 6th day of July, 1843, between the State of Indiana, party of the first party, by S. Fisher, commissioner of the Wabash & Erie Canal, thereto duly authorized by law, and Henry Johns, of the second part, witnesseth:

That said party of the first part, in consideration of the covenants and releases hereinafter contained, and upon the express condition that the party of the second part shall at all times comply with all and singular the limitations and conditions hereinafter contained, and shall, in every respect, perform all the stipulations of the agreement by said party to be performed, agrees to lease to said party of the second part forever, subject to the restrictions, limitations, and conditions hereinafter contained, the use and occupation of so much of the surplus water (not required for purposes of navigation, or to fill the contracts

heretofore made with Samuel Edsall, and Hamilton & Williams), at the town of Fort Wayne, to be used on lot number nine (9) of the county addition to said town, as will be sufficient, when properly applied on an overshot wheel of sixteed feet diameter, with the
160 proper gearing, to be approved by the commissioner of said canal, to propel three run of four-and-a-half feet mill-stones, grinding at the rate of five bushels per hour each, to be applied to such manufacturing purposes as the said second party may choose. It is understood that the second party to this agreement is entitled to the same quantity of water, whenever there is a surplus in the canal as above, that Allen Hamilton & Jesse L. Williams are entitled to under the lease, bearing date 29th of November, 1842. The water will be taken by a head-race from the canal, at the place above described, and after passing over the wheel will be conducted, by a suitable tail-race, into the St. Mary's River. The flow of water to the wheel will be regulated and controlled by a permanent regulating weir, to be constructed in the most substantial manner, with stone side and breast walls, agreeably to a plan to be furnished by the commissioner of the canal, to be built in every respect according to his directions, as not to endanger the safety of the canal in any manner whatever. And it is understood that the neces-
161 sary regulating weir, head race and trunk to conduct the water to the wheel, and the tail race to pass it from the wheel as above specified, are to be constructed by the party of the second part at his own expense and according to the direction of the commissioner aforesaid, and to be kept in good repair, so as to prevent the waste of water; and if at any time during the continuance of this lease any breach or other injury shall occur to the canal in consequence of the race or trunk not being faithfully constructed, or being suffered to be out of repair, or from any negligence of any person employed about the mills, then the said party of the second part shall forfeit and pay to the State the whole cost of repairing such breach or injury; and if the said party of the second part shall refuse or neglect to rebuild, repair, or strengthen said regulating weir or other works necessary to the security of the canal, after being notified in writing by the commissioner, superintendant, or other proper agent of the State that such removal is necessary for
162 the safety of the canal, such refusal or neglect shall subject the party of the second part to a forfeiture of this contract or lease at the option of the commissioner or other agent of the State thereto duly authorized.

It is expressly understood by the parties hereunto that the first party does not agree to furnish water to the second party except at such times as there is a surplus over and above what is required for purposes of navigation and to supply existing contracts with Samuel Edsall and Hamilton & Williams. And the right is also reserved by the first party to draw the water from the canal whenever it may be necessary to repair or prevent breaches, take out bars, or make any repairs whatever.

And the second party, for and in consideration of the right to the use and occupation of said water, agrees to release, and does hereby release, for himself, his heirs, and assigns, forever, all claim or claims against the State of Indiana for damages heretofore done or that may hereafter be done to any property now or heretofore owned by him, the said
163 Henry Johns, in consequence of diverting water from the St. Joseph River to supply the Wabash & Erie Canal and the mills erected or to be erected thereon or supplied therefrom.

And the said Henry Johns hereby releases to the State of Indiana all his right and title to the water flowing in the St. Joseph River when-

ever the same may be necessary for the supply of the canal and mills aforesaid.

And the said Henry Johns acknowledges the foregoing lease as being in full payment for all awards of damages heretofore made and for all damages done or hereafter to be done by diverting the water as aforesaid.

And it is understood by the parties hereto that the second party is to pay no rent other than releasing the first party from the payment of damages as above; and this agreement is made in pursuance of and with a view to carry out an act of the legislature, entitled "An act for the relief of Henry Johns," approved Feb. 11, 1843.

In testimony whereof we, the parties to this agreement, have hereunto set our hands and seals the day and year first above written.

164 S. FISHER, [SEAL.]
*Com. W. & E. Canal.*
HENRY JOHNS. [SEAL.]

Signed and sealed in presence of—
ALEX. MCCULLOCH.

R. Morgan French, upon oath, says that he is one of the petitioners in the application of French, Hanna, Jeffries and others for a share of the funds now in court in the above entitled suit, and that the allegations contained in the amended petition of said French and others, to which this affidavit is attached, are true, as he verily believes.

R. MORGAN FRENCH.

Subscribed and sworn to before me this May 13th, 1878.
[SEAL.] GEO. D. CRANE,
*Notary Public.*

165 And afterwards, to wit, at the May term of said court, on the 15th day of May, 1878, before the Hon. Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above entitled cause were had, to wit:

At the same time comes Samuel B. Gookins, esq., receiver herein, and files his demurrer to said petition, in the words following, to wit:

This defendant not admitting any of the matters and things in the said petition to be true as therein stated, nevertheless this defendant saith that the said petitioners have not, in their petition aforesaid, set forth and stated any such matters and things as do entitle them to any relief in a court of equity; wherefore this defendant doth demur thereto in law, and he prays the judgment of this honorable court whether the said petitioners have, in their petition, stated and set forth any such case as will entitle them to relief, and he prays that the said petition be dismissed.

S. B. GOOKINS,
*Receiver.*

Samuel B. Gookins, of counsel in this cause, hereby certifies that, in his opinion, the foregoing demurrer is well founded in law.

S. B. GOOKINS,
*Of Counsel.*

166 STATE OF INDIANA,
*Vigo County, ss:*

Samuel B. Gookins, being duly sworn, says he is defendant in the above entitled cause, and that the foregoing demurrer is not interposed for delay.

S. B. GOOKINS.

Subscribed and sworn to before me, a notary public of said county, this 14th day of May, 1878.

Witness my hand and notarial seal.

[SEAL.] GEO. C. DUY,
*Notary Public.*

And afterwards, to wit, at said May term of said court, on said 15th day of May, 1878, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above entitled cause were had, to wit:

At the same time come William Fleming et al., and file their demurrer to said petition herein in the words following, to wit:

The said defendants, not admitting any of the matters and things in said petition to be true, as therein stated, do nevertheless demur thereto; and, for causes of demurrer, assign the following, to wit:

1. That this court hath not jurisdiction of the persons of these defendants.

2. That this court hath not jurisdiction of the subject matter of said petition.

3. That the said petitioners have not, in their petition aforesaid, set forth and stated any such matters and things as do
167 entitle them to any relief in a court of equity as against these defendants, or upon which this court can ground any judgment or decree against these defendants; wherefore these defendants demur thereto in law, and they pray the judgment of this honorable court whether the said petitioners have, in their petition aforesaid, stated and set forth any such facts as will entitle them to relief against these defendants and whether they ought to answer further.

R. S. TAYLOR,
*Sol. for Def'ts.*

Robert S. Taylor, of counsel for said defendants in the cause, hereby certifies that, in his opinion, the foregoing demurrer, is well founded in law.

R. S. TAYLOR,
*Of Counsel.*

STATE OF INDIANA,
*Marion County:*

Robert S. Taylor, being duly sworn, on his oath, says that he is of counsel for said defendants Fleming, Bass, Simons, Lillie, Bippus, and Simonton, in the above entitled cause, and that the foregoing demurrer is not interposed for delay.

168 R. S. TAYLOR.

Subscribed and sworn to before me, this 15th day of May, 1878.

W. P. FISHBACK, *Clerk.*

*Demurrer of Jonathan K. Gapen to the intervening bill of French, Hanna and Co.*

The complainant, Jonathan K. Gapen, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true, doth demur to the said bill; and for cause of demurrer showeth:

1st. That this court hath not jurisdiction of the subject matter of said bill, or of the person of this complainant.

169 2nd. That the said bill doth not contain any matter of equity

whereon this court can ground any decree, or give the plaintiff any relief against complainant. Wherefore, and for divers other good causes of demurrer appearing in said bill, this complainant demurs thereto, and humbly demands the judgment of this court whether he should be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with his costs.

CLAYPOOL, NEWCOMB & KETCHAM,
*Solicitors for s'd Complainant.*

Claypool, Newcomb and Ketcham, counsel for said complainant in the above demurrer named, hereby certify that in their opinion the foregoing demurrer is well founded in law, and states further that the same is not interposed for delay.

CLAYPOOL, NEWCOMB AND KETCHAM,
*Solicitors for Complainant.*

*Dem'r of Gapen, 11.*

The said board of trustees of the Wabash & Erie Canal, who is made a defendant in the intervening bill of French et al. herein filed, by way of protestation, not confessing any of the matters in and by said intervening bill complained of to be true in the manner & form to call this defendant to answer, but that there is good cause of demurrer thereto, and he does demur accordingly, and for causes of demurrer says
170 that said intervening bill, in case the same were true, contains no matter of equity whereon this court can ground any decree or give complainant any relief as against this defendant.

Wherefore, & for divers other errors in said bill contained and appearing on the face thereof, this defendant does demur thereto, and humbly craves the judgment of this honorable court whether he is compellable or ought to make any answer thereunto, otherwise than as aforesaid.

And this defendant humbly prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

McDONALD & BUTLER,
*Solicitors for Board of Trustees of Wabash & Erie Canal.*

171 And afterwards, to wit, at the May term of said court, on the 22nd day of May, 1878, before the Hon. Walter Q. Gresham, one of the judges of the *judges of* said court, the following further proceedings in the above entitled cause were had, to wit:

Come now the parties, by their solicitors aforesaid, and this cause coming up for further consideration upon the intervening bill of French, Hanna, and others, Jonathan K. Gapen now files his separate demurrer to said intervening bill; and the court having duly considered said demurrer and the other demurrers to said intervening bill of French, Hanna, and others, does now find and determine that said intervening bill contains no matter of equity against either or any of the defendants in said intervening bill, and each of the several demurrers to said intervening bill are by the court sustained for the want of equity and for other causes contained and appearing in said bill; to which ruling and decision of the court French, Hanna & Co. except. It is therefore ordered that the said intervening bill be, and the same is hereby,
172 dismissed at the cost of the complainants therein. The complainants in said intervening bill now pray an appeal to the Supreme Court of the United States, which appeal is now granted; and, on motion of the complainants in said intervening bill, it is ordered that S. B. Gookins, the receiver herein, reserve and withhold from the money and assets now in his hands for distribution the further sum of fifteen thou-

sand dollars additional to the twenty thousand dollars hereinbefore ordered to be reserved, and also about nine thousand dollars, the amount of the claim of Fleming, now herein pending, said sums to be reserved until the determination of the claims mentioned above, or until the further order of this court, and in the meantime that they be paid into the registry of this court.

173 And afterwards, to wit, at the May term of said court, on the 27th day of May, 1878, before the Hon. Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

*Appeal.*

Come again the parties, by their respective solicitors, and said intervenors, French, Hanna and Co., pray an appeal to the Supreme Court from the decision and order of the court sustaining the respective demurrers of said Gookins, receiver, Gapen, and said purchasers, Fleming, Bass, and others, to their said intervening bill, and dismissing the same; which appeal is granted and allowed by the court, and said French, Hanna and Co. are directed to file their bond in the penalty of ($1,500.00) fifteen hundred dollars, with surety to the approval of the court, conditioned for the due prosecution of said appeal and for the payment of all costs assessed against them on said appeal.

And now said French, Hanna and Co. tender said bond, with Pliny Hoagland and John Orff as sureties, which is approved by the court, and is ordered to be filed, which is now done.

174 UNITED STATES OF AMERICA,
*District of Indiana, ss:*

I, W. P. Fishback, clerk of the circuit court of the United States for the district of Indiana, do certify the above and foregoing to be a full and true transcript of the proceedings on the intervening bills in the above entitled cause, as the same appear on the files now in my custody.

Witness my hand and the seal of said circuit court, at Indianapolis, in said district, this 7th day of August, A. D. 1878.

[SEAL.] W. P. FISHBACK, *Clerk.*

175 In the Supreme Court of the U. S.

Appeal from the circuit court for the district of Indiana.

JAMES SPEARS FOR HIMSELF AND SURVIVING partner of the firm of Spears & Case, John S. Case, James S. Case, Reid Case, Chas. G. Case, Josephine C. Schemmerhorn, Bernard F. Schermerhorn, Hulda E. Case, and Waldo W. Williams

*vs.*

JONATHAN K. GAPEN, THE BOARD OF TRUSTEES of the Wabash & Erie Canal, Samuel B. Gookins, receiver of the W. & E. Canal, Elbert H. Shirk, H. N. Shirk, A. N. Dukes, Thos. J. , Wm. Dolan, Jacob W. Dewitt, Chas. B. Knowlton, Enoch Reinhart, and Abner H. Bowen.

Come now the above named appellants and say that manifest error

intervened in the proceedings and judgment in the court below in this, namely:

First. That the court below erred in sustaining the several demurrers of the appellees to the intervening petition and bill of the appellants.

Second. The court below erred in holding that there was no
176 equity in the intervening bill and petition of the appellants, and in dismissing the said bill for the want of equity.

CASE, BUSKIRK & NICHOL,
*Sol. for Appellants.*

177 In the Supreme Court of the U. S.

Appeal from the circuit court for the district of Indiana.

R. MORGAN FRENCH, OLIVER W. JEFFIDS, & Chas. Hanna, constituting the firm of French, Hanna & Co., and Warren H. Withers, trustee of said Chas. Hanna.

*vs.*

JONATHAN K. GAPIN, THE BOARD OF TRUSTEES of the Wabash & Erie Canal, Samuel B. Gookins, receiver of the W. & E. Canal, Wm. Flemming, John H. Bass, Oscar A. Simons, James Lilly, Geo. J. Bippis, and Robert Simonton.

Comes now the above named appellants and say that manifest error intervened in the proceedings & judgment in the court below, in this, namely:

First. That the court below erred in sustaining the several demurrers of the appellees to the intervening bill and petition of the appellants.

Second. That the court below erred in holding that there was no equity in the intervening bill & petition; and

Third. That the court erred in holding that the court had no jurisdiction of the parties & subject matter, and in dismissing the said
178 bill for the want of equity & jurisdiction.

Wherefore appellants pray that said decree be in all things reversed.

JOHN MORRIS & CHAS. E. CASE,
*Sol. for Appellants.*

(Indorsement on cover:) No. 327. French, Hanna & Co., appellants, vs. Jonathan K. Gapen et al. Filed 5th November, 1878. And No. 337. James S. Spears et al., appellants, vs. Jonathan K. Gapen, The Board of Trustees of the Wabash & Erie Canal et al. Filed 18th November, 1878. Indiana C. C. U. S.